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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1901.**

No. 257.

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ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, PETITIONER,

*vs.*

WILLIAM T. NUGENT.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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**PETITION FOR CERTIORARI FILED FEBRUARY 26, 1901.**
**CERTIORARI AND RETURN FILED MARCH 25, 1901.**

**(18,061.)**

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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a *Return to Writ of Certiorari.*

Supreme Court of the United States.

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| In the Matter of the Petition of W. T. NUGENT to Review an Order of the District Court of the United States at Louisville in the Case of The Wayne Knitting Mills, Belding Brothers & Co., and The German Insurance Bank<br>*vs.*<br>E. B. NUGENT. | No. 920. In Bankruptcy. |

1 *Transcript of Record.*

United States Circuit Court of Appeals for the Sixth Judicial District.

| | |
|---|---|
| THE WAYNE KNITTING MILLS, BELDING BROTHERS & COMPANY, and The German Insurance Bank<br>*vs.*<br>E. B. NUGENT, Bankrupt. | |

*Petition for Review in Bankruptcy.*

The petition of W. T. Nugent, who was adjudged to be in contempt of court for failing to pay to Arthur E. Mueller, trustee of the estate of E. B. Nugent, bankrupt herein, the sum of $14,233.45 and to be imprisoned in the county jail until he shall deliver same to said Mueller, trustee aforesaid, respectfully shows to this honorable court, that on February 19, 1900, about five o'clock p. m., the Wayne Knitting Mills, Belding Brothers & Company, and the German Insurance Bank filed an involuntary petition in bankruptcy against E. B. Nugent in the district court of the United States, for the district of Kentucky, sitting at Louisville, Kentucky, and that on said petition on March 23, 1900, said E. B. Nugent was adjudged a bankrupt; that Arthur E. Mueller was appointed trustee of said estate on the 7th day of April, 1900, he filed a petition before the referee in said matter asking for a rule against the bankrupt, E. B. Nugent, requiring him to show cause why he should not be required to pay the sum of $14,435.95, being money realized from mortgage executed by him on February 9, 1900, on certain real estate in Louisville, Kentucky, to George L. Everbach and Frank Hohman, executors, and money realized by him from the sale of his stock of merchandise sold to Herman Straus, on February 17, 1900, and delivered on February 19, 1900, some several hours before the petition in bankruptcy was filed. That a rule was awarded thereon requiring said E. B. Nugent to show cause why he should not pay said sum to said trustee on or before April 18, 1900, before 9.30 o'clock a. m.

2 That to said rule said E. B. Nugent responded on 18 day of April, 1900, that he was willing and ready to be examined fully as to said matter.

That it was a physical impossibility for him to comply with said order either in whole or in part—as he had no money, or means or property to obtain any. That no part of either of said sums ever came into his hands, or in his possession, or under his control, and he could not produce same, or any part thereof. That W. T. Nugent was looking after defendant's business at the time of this sale, and mortgage, and informed him of the necessity to raise money to pay his debts, and he consented to said sale and mortgage for that purpose, and that he endorsed the check to his son to pay his (E. B. Nugent's) debts; that his son left and was absent some time, and upon his return he tried in every way to obtain said money from him, but he refused to pay it over, and again left, and his whereabouts were not known to him. That the referee adjudged this response insufficient and ordered the bankrupt to pay the entire sum to the trustee—and upon his failure, adjudged him in contempt and certified said matter to the court with the recommendation that the bankrupt be punished therefor.

That the court thereupon, on said proceedings, ordered the bankrupt to pay said money into court by the 26th day of April, 1900, and on the 26 day of May, 1900, upon suggestion made by counsel for said bankrupt that said bankrupt was mentally unsound, the court had a special hearing upon this phase of the case, and adjudged that the bankrupt was an unfit subject for punishment and discharged him without day.

That on the 13th of April, 1900, upon the petition of the said trustee filed before the referee, W. T. Nugent was enjoined by said referee from disposing of any of said sums in his hands and ordered to show cause, if any he could, within five days from the service of the copy of the order, why he should not be required to pay said sum of money to said trustee. That this order was not served upon him until the 8th day of October, 1900, and that he had no notice of the granting of the same or any knowledge or information that it had been granted until said service was had upon him or of the filing of the petition therefor before the referee. That he thereupon, upon the 13th day of April, 1900, was brought in before said referee and required to, and did, file his response thereto, said response being as follows:

3 "Defendant, W. T. Nugent, for response to the order made herein on April 13, 1900, requiring him to pay $14,435.95 to the trustee herein says, that as shown by the pleadings, records, and the evidence in this case taken and the entire proceedings had therein, neither the court or the referee in bankruptcy herein has any jurisdiction either of this respondent or the matter involved to make any such order or to require this respondent to answer thereto, because he says that said records herein show that if respondent received said money or any part thereof, it was before the petition in bankruptcy was filed, and in that event neither the court or the referee in bankruptcy can proceed against this respondent as

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herein attempted by order or rule to pay, and he now hereby asks that this be taken as his response herein and that said order be set aside and vacated. He says that at no time since the filing of the petition in bankruptcy herein has he received said $14,435.95 or any part thereof.

Defendant for further response herein, says that he ought not to be required to respond as to matters herein set forth or any of them, because he says that within the last few days he has been indicted in the district court of the United States for the district of Kentucky, sitting at Louisville, charged with the offense of receiving said $14,435.95, after the filing of the petition in bankruptcy against E. B. Nugent, and also with retaining same and aiding and abetting in the retention thereof both after the filing of said petition and the adjudging of said Nugent a bankrupt thereunder for the purpose of defeating the bankrupt law. He says that said indictment is still pending undetermined, and his response herein in regard to these matters would tend to criminate him thereunder. He says that this indictment grew out of the transactions upon which this litigation is based and said indictment is based upon the identical transactions that he is now called upon to respond in reference thereto and that he is now in jail under said charge awaiting trial, and to compel him to respond herein would deprive him of the constitutional right guaranteed to him by the Constitution, that is that he shall not be compelled to give evidence as against himself.

And now having fully responded herein, he prays that the order herein be set aside and vacated and that he be dismissed from further response thereto."

And that he was thereupon, over his objection and that of his counsel, required to be sworn and examined in regard to said matters, but that said referee held, and so ruled, that he was not required to answer any of said matters that would tend to incriminate him under said indictment. That he, at the time, objected through his counsel, to the hearing of any evidence upon said matter or any proceedings therein on account of the want of jurisdiction of said referee to thus proceed against him and because of the indictment as stated, and for other reasons assigned at the time, which will fully appear of record, but that said referee proceeded upon said matter and thereupon ordered this petitioner to pay by 9:30 on the next day the sum of $14,233.45 to the trustee herein and the respondent having failed to obey said order, the referee adjudged him to be in contempt and recommended that the court impose a punishment therefor. That thereupon this petitioner filed a petition for review in said matter and same was certified to the court. The referee also reported his findings to the court by which he held and adjudged that said money was paid to W. T. Nugent, as agent and bailee of E. B. Nugent, part on February 9, 1900, and remainder three hours before the filing of said petition in bankruptcy against said Nugent. That the court upon the hearing of said matter, upon the petition for review, and the orders of said referee of Oct. 16, 1900, which required the payment of the money by respondent and which adjudged him in contempt, adjudged that

said referee had the power to make said order and adjudges this petitioner in contempt in his failing to pay same thereunder and that he be imprisoned as aforesaid. That is that he be imprisoned in the county jail until he shall deliver to said trustee said sum of $14,233.45.

Your petitioner says that said court filed his opinion in this case on the 1st day of November, 1900, but by request of counsel for petitioner, did not render judgment or pronounce sentence thereon until November 3rd, 1900, in order that said counsel might have an opportunity to examine and consider same, and that on the 3rd day of November, 1900, before said judgment was rendered, or sentence pronounced, he offered to file the following amended response which the court refused to permit to be filed:

"United States District Court, District of Kentucky.

WAYNE KNITTING MILLS ET AL. vs. E. B. NUGENT, Bankrupt. } Amended Response.

5 Defendant, W. T. Nugent, by way of amended response herein, files herewith a copy of the indictment against him referred to in his original response and marks same 'W. T. N.' and files same as an exhibit herein and as part of this response. He says that while it is true that the referee held his response herein as insufficient, he says that it is further true that said referee stated and held, at the time, that he could not be required to respond herein as to matters that had a tendency to incriminate him under said indictment and refused to permit him to be examined by said trustee as to any matters or transactions directly or indirectly relating to the transactions involved in said indictment. Respondent says, that believing as he did and being advised that he could not be legally required to respond to any such transaction and by reason of said ruling of the referee, he did not make his full response as to the entire facts.

He now asks to amend said response, and states that he has not the $14,233.45 or any part thereof now in his possession or under his control, and did not have same in his possession or under his control at the time the process was served on him herein on October 8, 1900, nor did he have any notice of any injunction herein until said service. He says that neither at the time of the filing of the petition in bankruptcy herein against E. B. Nugent or at time subsequent thereto, did he have in his hands any amount of money belonging to said Nugent which he held as his agent or bailee. He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent or any such money at any subsequent date thereto, was not received or held by this respondent as agent or bailee or in any trust capacity whatever, but was held adversely to said E. B. Nugent.

And he prays as in his original response.

— —.

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Subscribed and sworn to before me by W. T. Nugent this 2nd day of November, 1900.

——— ———."

He says that as alleged in his original response, and as is shown by the copy of the indictment filed herewith, he is charged therein not only with receiving said money after the filing of said petition in bankruptcy, but is also charged with retaining same and aiding and abetting in the retention thereof both after the filing of said petition and the adjudication of said E. B. Nugent a bankrupt thereon, for the purpose of defeating the purposes of the bankrupt act. He says that he was so advised by his attorneys and believed, that his response in reference to these matters would tend to incriminate him under said indictment—that he was at the time arrested and in jail, under said indictment from whence he was brought in custody of an officer to make said response, and still so remains in jail. That but for these reasons he could and would have responded fully and could and would have shown that he was not in contempt of the court—and that when the referee held his response as a whole insufficient he would have filed an amended response, but for the fact that the referee stated and so held that he could not be examined, or required to answer as to such matters as would tend to criminate him under said indictment. He says that he had no notice of the filing of the petition or the application for the injunction herein, thereon, and that same is irregular and void, and said referee had no right to grant or issue said injunction or rules thereon. That he had no notice of the proceedings herein until he was arrested or any knowledge or information thereof and that as shown in these proceedings and the findings both of the court and referee herein—all said money was received by him before the filing of the petition in bankruptcy herein and both the referee and court so find, and it is shown that he held same adversely to the said E. B. Nugent, and as transferee before the filing of said petition. He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use (he being a creditor of said Nugent) and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy, or the appointment of said trustee, or the adjudication herein, and that there was no evidence to the contrary, or that he had any of said money on hand, or under his control, when he was served herein as stated.

He, as advised, states and charges that the contempt for which he is proceeded against and held herein, is a civil contempt, a failure to pay money which he is ordered by the court to pay, for the benefit of others, and that as also shown by the proceedings herein, his failure to answer fully in said matter is due entirely to the fact that he stood indicted, and was not required to answer, and the further fact, as he was advised, that the court had no jurisdiction, and that upon the determination by the court, that it had jurisdiction, this petitioner offered said amended response under which—had he been

permitted to file same—he could and would have shown as herein stated.

Your petitioner further shows that he is aggrieved by the orders of said district court, and injured thereby, and that the errors complained of consist:

7

I.

In said court holding that the referee and said court had jurisdiction and power to proceed against petitioner, W. T. Nugent, in the summary way had, he being a third party—and not the bankrupt.

II.

In said court holding that it had jurisdiction and power upon the proceedings and recommendations of the referee had, to adjudge said W. T. Nugent in contempt, and to punish him by imprisonment.

III.

In said court holding that the referee had jurisdiction and power to proceed against said W. T. Nugent in said summary manner had.

IV.

In said court holding that W. T. Nugent held said money as agent of E. B. Nugent, and also that he as such agent could be proceeded against in said summary manner had.

V.

In said court holding that said referee had power and jurisdiction under said petition filed for injunction, to grant or issue said injunction against W. T. Nugent thereon, or issue said order or rule thereon, or to proceed against him in the manner had, upon said order and rule issued.

VI.

In said court holding that the filing of said response of W. T. Nugent gave said referee or court jurisdiction, or power to proceed thereon in any manner in said matter, or in the manner had.

VII.

In said court adjudging said response insufficient.

VIII.

In said court finding the facts to be, and adjudging that said sum is the property of the bankrupt's estate, and that it had been taken possession of, and was held by W. T. Nugent, as the agent of his father, up to and at the time of the adjudication, and that said W. T. Nugent never claimed title to any of it nor made any claim of right to it by reason of an attempted transfer of title or ownership

8 thereof to him at any time, either in fraud of the bankrupt's creditors, or otherwise, and that he had never claimed to

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have converted it to his own use, or to have claimed it adversely to the bankrupt or trustee.

IX.

In the court adjudging that said money was not converted by W. T. Nugent to his own use, but held for the benefit of the trustee.

X.

In the court adjudging that said W. T. Nugent was properly before the court in said proceedings.

XI.

In the court failing to dismiss said contempt proceedings against W. T. Nugent and discharging him.

XII.

In the court refusing to permit said amended response of W. T. Nugent to be filed, and giving him a hearing thereon.

XIII.

In the court sentencing said W. T. Nugent to be imprisoned for an indefinite period of time, or until he paid said money to the trustee.

Your petitioner shows that under the law of this case, he was and is entitled to be discharged from custody, and he respectfully asks for an early hearing in this matter, and that same be presented upon this petition, and the exhibits and evidence hereinafter mentioned, and filed as part hereof, and now on file in the district court of the United States, at Louisville, Kentucky, where said proceedings were had. Said exhibits being as follows, to wit:

Original petition in bankruptcy, Exhibit No. 1.
Order and release of E. B. Nugent, Exhibit No. 2.
Petition for injunction before referee, Exhibit No. 3.
Referee's certificate to the judge for review, Exhibit No. 4.
Response of W. T. Nugent, Exhibit No. 5.
Report of referee, Exhibit No. 6.
Petition for review, Exhibit No. 7.
Order filing court's opinion, Exhibit No. 8.
Court's opinion, Exhibit No. 9.
Order refusing amended response and judgment and sentence rendered, Exhibit No. 10.
Amended response and copy of indictment, Exhibit No. 11.

9 Deposition of W. T. Nugent, Exhibit No. 12.

Wherefore your petitioner prays that the orders, judgments, and sentence of the district court be reviewed and revised, in the matters of law, so as to adjudge that your petitioner be released and discharged, but if this cannot be done, then he asks that he be permitted to further respond in said matter so as to present the facts to the court and he now prays for other necessary and proper relief,

and he prays to be permitted to execute bond for his appearance, and to be released, pending said proceedings.

ZACK PHELPS,
FRED FORCHT, JR.,
W. M. SMITH,
*Attorneys for Petitioner.*

W. T. Nugent says the statements contained in this petition are true.

W. T. NUGENT.

Subscribed and sworn to before me by W. T. Nugent, this 9th day of November, 1900. My commission as notary public expires January 12, 1902.

[SEAL.] FREDERICK FORCHT, JR.,
*Notary Public, Jefferson County, Kentucky.*

No. 920. United States circuit court of appeals for the sixth judicial circuit. The Wayne Knitting Mills, etc., *vs.* E. B. Nugent, bankrupt. Petition for review in bankruptcy of W. T. Nugent. Filed Nov. 10, 1900. Frank O. Loveland, clerk. Zack Phelps, Fred Forcht, W. M. Smith, attorneys for W. T. Nugent.

10 United States Circuit Court of Appeals for the Sixth Circuit.

WAYNE KNITTING MILLS, BELDING BROS. & COMPANY, GERMAN Insurance Bank
*vs.*
EDWARD B. NUGENT, Bankrupt.

On petition for review in bankruptcy.

*Motion to Strike Out or Expunge Part of the Record—Motion for Certiorari to Supply Record—Stipulation Controverting Allegations of Petition for Review—Stipulation as to Motions and Order Controverting.*

Comes Arthur E. Mueller, trustee of the bankrupt herein, and moves the court to strike out or expunge from the record herein the following allegations of the petition for review herein, to wit:

First. The words in said petition contained on the first page thereof, on the next to the last line, as follows:

"On February 17th, 1900."

Second. The words in said petition contained on the third page and eighth and ninth lines thereof as follows:

"Upon the 13th day of April, 1900."

Third. The words in said petition contained on the fourth page thereof, beginning on the 18th line, and reading as follows:

"And that he was thereupon over his objection and that of his counsel required to be sworn and examined in regard to said matter; but."

Fourth. The words in said petition contained on the 7th page thereof, and beginning on the 7th line, reading as follows:

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"He says that he was so advised by his attorneys and believed that his response in reference to these matters would tend to criminate him under said indictment."

Fifth. Also the words immediately following those next above shown, to wit:

"That he was at the time arrested and in jail, under said indictment from whence he was brought in custody of an officer to make said response, and still so remains in jail."

11 Sixth. Also the words immediately following those next above shown, to wit:

"That but for these reasons he could and would have responded fully and could and would have shown that he was not in contempt of the court—and that when the referee held his response as a whole insufficient he would have filed an amended response, but for the fact that the referee stated and so held that he could not be examined or required to answer as to such matters as would tend to criminate him under said indictment."

Seventh. Also the words immediately following those next above shown, to wit:

"He says that he had no notice of the filing of the petition or the application for the injunction herein thereon, and that the same is irregular and void and said referee had no right to grant or issue said injunction or rule thereon."

Eighth. The words in said petition contained on the 7th page thereof, beginning on the 25th line thereof, reading as follows:

"And it is shown that he held same adversely to the said E. B. Nugent and as transferee before the filing of said petition."

Ninth. The words immediately following those last above quoted, to wit:

"He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use, he being a creditor of said Nugent, and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy or the appointment of said trustee or the adjudication therein, and that there was no evidence to the contrary or that he had any of said money on hand or under his control when he was served herein as stated."

Tenth. The words in said petition contained on the 8th page thereof, beginning on the 4th line and reading as follows:

"He, as advised, states and charges that the contempt for which he is proceeded against and held herein is a civil contempt, a failure to pay money which he is ordered by the court to pay, for the benefit of others, and that as also shown by the proceedings herein, his failure to answer fully in said matter is due entirely to the fact that he stood indicted, and was not required to answer, and the further fact, as he was advised, that the court had no jurisdiction, and that upon the determination by the court that it had jurisdiction, this petitioner offered said amended response, under which, had

12 he been permitted to file same, he could and would have shown as herein stated."

And for grounds for said motions he says that the statements or allegations in said petition for review above quoted are not justified

y the record or the finding of fact in the opinion of the district judge or the referee herein, and are original and impertinent matter.

He further moves the court to strike out or expunge from the record Exhibit No. 2 filed with said petition for review, to wit, "an order and release of E. B. Nugent," because said order and release are not on review from the lower court, and are not on trial on this review.

He further moves the court to strike out or expunge from the record Exhibit No. 12 filed with said petition, to wit, "the deposition of William T. Nugent," because the same was not taken upon the response of said William T. Nugent, but expressly taken upon a general examination, and said deposition was not and is not now a part of the record in the trial below in this matter now on review.

He further moves to strike out or expunge from the record herein the Exhibit No. 11: "amended response and copy of indictment," because same has no place in the record in the court below and should not properly be filed here on this petition for review.

And further he moves to strike out or expunge from the said petition of review all mention of or reference to said amended response or copy of indictment, or so much thereof as refers to and is based on said copy of said indictment.

If the motion to expunge Exhibit No. 2 be denied, this trustee moves the court to require the petitioner to bring up to be made part of the record in this cause a certified copy of the opinion of the court below, which was delivered at the time of the entry of the order and release of the said Edward B. Nugent, as shown by Exhibit No. 2.

And this trustee further moves the court to require the petitioner to bring up to be made a part of the record of this court in this cause, the order of the district court adjudging the bankruptcy and referring the cause to John B. Baskin as one of the referees of the said court.

WILLIAM W. WATTS,
JOHN RICHARD WATTS,
*Attorneys for Arthur E. Mueller, Trustee.*

13 *Stipulations.*

For the purpose of a speedy trial, as suggested by his honor Judge Lurton, at Nashville, Tennessee, November 23rd, 1900, in order to complete and prepare the record in time for trial December 7th, 1900, it is hereby stipulated that the foregoing motions may be filed with the clerk of this court and be printed in the record of this cause immediately following the petition for review, the same to be heard on hearing in chief. And in furtherance of the above it is also stipulated that such affirmative allegations of said petition for review as properly should be denied be treated as controverted of record without prejudice to the hearing of said motion; and the

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entry of these motions and filing the stipulations may be noted of record at the time of the hearing herein.

WILLIAM W. WATTS,
JOHN RICHARD WATTS,
*Attorneys for Arthur E. Mueller, Trustee.*
W. M. SMITH,
*Attorneys for William T. Nugent, Petitioner.*

United States circuit court of appeals for the sixth circuit. Wayne Knitting Mills, Belding Bros. & Company, German Insurance Bank *vs.* Edward B. Nugent, bankrupt. On petition for review in bankruptcy. Motion to strike out or expunge part of the record. Motion for certiorari to supply record. Stipulation controverting allegations of petition for review. Stipulations as to motions and order controverting. Filed Nov. 28, 1900. Frank O. Loveland, clerk.

## EXHIBIT No. 1.

In the District Court of the United States for the District of Kentucky.

To the Honorable Walter Evans, judge of the district court of the United States for the district of Kentucky:

The petition of Wayne Knitting Mills, a corporation incorporated under and by virtue of the laws of the State of Indiana, and carrying on business at Fort Wayne, in the county of Allen and State of Indiana, and Belding Bros. & Company, a corporation incorporated under and by virtue of the laws of the State of Connecticut, and carrying on business at Cincinnati, in the county of Hamilton and State of Ohio, and German Insurance Bank, a corporation incorporated under and by virtue of the laws of the State of Kentucky, and carrying on business at Louisville, in the county of Jefferson and State of Kentucky, respectfully shows:

That Edward B. Nugent, of Louisville, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business (or resided, or had his domicile) at Louisville, in the county of Jefferson and State and district aforesaid, and owes debts to the amount of $1,000.00.

That your petitioners are creditors of said Edward B. Nugent, having provable claims, amounting in the aggregate, in excess of securities held by them, to the sum of $500.00. That the nature and amount of your petitioners' claims are as follows:

| | |
|---|---|
| Wayne Knitting Mills, an open account for..... | $274 76 |
| Belding Bros. & Company, an open account for..... | 313 50 |
| German Insurance Bank, a note due March 1st, 1900..... | 1,000 00 |
| German Insurance Bank, a note due March 9th, 1900..... | 2,000 00 |
| German Insurance Bank, a note due April 1st, 1900..... | 1,000 00 |
| German Insurance Bank, a note due May 14th, 1900..... | 2,000 00 |

And your petitioners further represent that said Edward B. Nugent is insolvent, and that within four months next preceding the

date of this petition, the said Edward B. Nugent committed an act of bankruptcy, in that he *did* heretofore, to wit, on or about the 19th day of February, A. D. 1900, conveyed, transferred, concealed and removed and permitted to be concealed and removed, a portion of his property with intent to hinder, delay and defraud his creditors; and

Transferred, while insolvent, a portion of his property to one or more of his creditors with intent to prefer one or more of his creditors over his other creditors.

Wherefore, your petitioners pray that service of this petition, with a subpœna, may be made upon Edward B. Nugent, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

WAYNE KNITTING MILLS,
BELDING BROS. & CO.,
By W. W. & J. R. WATTS, *Att'ys.*
GERMAN INSURANCE BANK,
By W. H. EDINGER, *Pres't.*

W. W. & J. R. WATTS,
KOHN, BAIRD & SPINDLE, *Attorneys.*

15 UNITED STATES OF AMERICA, }
*District of Kentucky,* } *ss:*

—— —— says he is president of the German Insurance Bank, one of the petitioners above named, and does hereby make solemn oath that the statements contained in the foregoing petition subscribed by him are true, before me, E. B. Kerr, this 19th day of February, A. D. 1900.

E. B. KERR,
*Notary Public, Jefferson County, Kentucky.*

My commission expires at the ending of the present session of the Kentucky senate.

I, W. W. Watts, do hereby make solemn oath that I am attorney for the petitioners above named, Wayne Knitting Mills and Belding Bros. & Co., each of whose officers and agents are now absent from the district of Kentucky, and that the statements of the foregoing petition subscribed by me as attorney as aforesaid are true as I verily believe.

W. W. WATTS.

Subscribed and sworn to before me by W. W. Watts, this 19th day of February, 1900.

E. B. KERR,
*N. P., J. C., Ky.*

A copy.
Attest: THOS. SPEED, *Clerk.*

My commission expires at the ending of the present session of the Kentucky senate.

339. In the district court of the United States for the district of Kentucky. In the matter of Wayne Knitting Mills, etc., *vs.* Edward B. Nugent. In bankruptcy. Petition. Filed Nov. 10, 1900. Frank O. Loveland, clerk. Filed Feb. 19, 1900, 5 p. m. Thos. Speed, clerk. W. W. & J. R. Watts, attorneys for petitioners.

16 EXHIBIT No. 2.

District Court of the United States, District of Kentucky.

SATURDAY, *June 23rd*, 1900.

WAYNE KNITTING MILLS CO., &C., )
*vs.* ) In Bankruptcy.
EDWARD B. NUGENT. )

This case has been heard upon the question of the adoption of the referee's recommendation to require the bankrupt E. B. Nugent to pay to the trustee herein the sum of $14,435.95, money realized from the sale of the stock of merchandise and from the mortgage described in the papers, or to punish him for contempt in case he fails to so pay, the response of said bankrupt filed thereto and the suggestion filed by counsel as to the insanity of said bankrupt, evidence having been heard by the court as to the present condition of mind of said Nugent, and the court being fully advised, delivered a written opinion herein, which is ordered to be filed, and pursuant to which it is considered by the court that the said Nugent is not now in such condition of mind as to make him properly subject to an order punishing him for contempt. It is therefore ordered that said Nugent be permitted to go hence without day, but the trustee of said Nugent in bankruptcy has leave again to bring the subject to the attention of the referee in bankruptcy, should development or change of condition in said Nugent's mind make it in his judgment proper.

A copy.

Attest: [SEAL.] THOS. SPEED, *Clerk*.

Filed Nov. 10, 1900.

FRANK O. LOVELAND, *Clerk*.

EXHIBIT No. 3.

In the District Court of the United States for the District of Kentucky.

In the Matter of EDWARD B. NUGENT, Bankrupt. In Bankruptcy.

Respectfully represents Arthur E. Mueller, trustee of the bankrupt herein, that as shown by the testimony in this case the
17 said bankrupt pretends that the $14,435.95, being the proceeds of the sale of the stock of goods and the mortgage upon the real estate on Third street, in Louisville, Kentucky, is in the possession of his son, William T. Nugent; that as shown by the

record in this cause an order was entered requiring the said William T. Nugent to appear before the referee herein and testify concerning the estate herein, and that said order has been returned "Not found," and that a second order to such effect for his appearance has been entered and the same is now in the hands of the officers for execution. He says that the said William T. Nugent so conceals his whereabouts that it is impossible for this petitioner, and as he is informed for the marshal of this court having said second order for execution, to learn of his said whereabouts; that petitioner is informed that there are persons offering to divulge the whereabouts of the said William T. Nugent so that said order can be executed, upon the payment of the sum of $50.00.

He further reports that as shown by the evidence herein the said William T. Nugent was authorized by the bankrupt herein to receive the said fund of $14,435.95, and that while said bankrupt pretends that he requested the payment of said money by said W. T. Nugent to said bankrupt he has made no effort to get said money and put it into the hands of this petitioner either as receiver of this court or as trustee, and that, notwithstanding that said bankrupt further pretends that he and his son were proposing to use said money to settle with the creditors and start another business elsewhere; and petitioner further reports that notwithstanding the said William T. Nugent was present in Louisville up to the time of the proceeding in bankruptcy herein, he immediately thereon or immediately thereafter concealed his whereabouts from this petitioner and has kept them so concealed since that time.

Petitioner further refers to the record herein as to the order entered herein on the 11th day of April, A. D. 1900, directing the said Edward B. Nugent to pay said sum of money to this petitioner on or before the 18th day of April, 1900, and though petitioner says that he does not know whether said money is in the hands of said Edward B. Nugent or under his control or in the hands of the said William T. Nugent, or under his control, he is fearful that said fund will be dissipated, and that said order may not be wholly effectual unless an injunction or restraining order be entered herein enjoining or restraining the said William T. Nugent from disposing of any part of said funds and further ordering him to pay said fund
18 into the hands of this petitioner. Petitioner says that from the evidence in this case already taken it appears, and petitioner believes, that the said sum of $14,435.95 is a part of the estate and property of the bankrupt herein; that the same did not come into the hands of the said William T. Nugent, if at all, as a common or simple debtor, and that he does not occupy that relation to this estate, but that said sum is a fund belonging to this estate and should be in the hands of this petitioner.

The premises considered, he prays for instruction as to the said matter as herein set up concerning the payment of the said sum of $50.00 as an aid to ascertain the whereabouts of the said William T. Nugent; he prays for an order enjoining and restraining the said William T. Nugent from disposing of the said money or any part thereof and further ordering and directing him to pay all, or so

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much thereof as he may have in his hands into the hands of this petitioner.

W. W. & J. R. WATTS,
*Attorneys for Mueller, Trustee.*

Arthur E. Mueller says that he is trustee of the estate of the bankrupt herein, and that the statements contained in the foregoing petition are true, as he believes.

ARTHUR E. MUELLER.

Subscribed and sworn to before me by Arthur E. Mueller, this 13 day of April, 1900.

My commission expires on the 12th day of January, 1904.

W. W. WEISSGERBER,
*Notary Public within and for County of Jefferson, State of Kentucky.*

Trustee's petition filed with referee April 13, 1900, 4 o'clock p. m.

JOHN B. BASKIN,
*Referee in Bankruptcy.*

A copy.
Attest: [SEAL.] THOS. SPEED, *Clerk.*

Filed Nov. 10, 1900.

FRANK O. LOVELAND, *Clerk.*

19

EXHIBIT No. 4.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of WAYNE KNITTING MILLS, &c.,
*vs.*
EDWARD B. NUGENT, Bankrupt.

*Referee's Certificate to the Judge for Review.*

I, John B. Baskin, one of the referees of said court in bankruptcy, do certify that in the course of the proceedings in said cause before me the following question arose pertinent to said proceedings:

The trustee filed his petition praying that an injunction might be issued against W. T. Nugent, enjoining and restraining him from disposing of the sum of $14,435.95, or any part thereof, belonging to the estate of the bankrupt, and also praying that an order might be entered requiring the said W. T. Nugent to pay the said sum to the trustee herein. Said petition is filed herewith and made part hereof marked No. 1. Upon the evidence contained in said petition I entered an order, which is as follows:

"At Louisville, in said district, on the 13th day of April, A. D. 1900, before John B. Baskin, referee in bankruptcy.

"No notice having been given, and no adverse interest appearing, comes the trustee and files herein his petition, and on his motion it

is now ordered that W. T. Nugent be and he is hereby enjoined and restrained from disposing of the sum of $14,435.95, or any part thereof, alleged to have been received by him in money from the estate of the bankrupt and belonging to said estate, until further orders of the court.

"It is further ordered that said W. T. Nugent be and appear before John B. Baskin, at his office, rooms 1001–5 Columbia building, in the city of Louisville, Ky., within five days from the service of a copy of this order, to show cause, if any he can, why he shall not be required to pay said sum of money to the trustee in this cause.

"Witness John B. Baskin, one of the referees in bankruptcy of said court, and the seal thereof, at Louisville, in said district, this 13th day of April, A. D. 1900.

"JOHN B. BASKIN,
"*Referee in Bankruptcy.*"

20 A copy of said order was executed upon the said W. T. Nugent on the 8th day of October, 1900.

I do further certify that on the 13th day of October, A. D. 1900, this cause coming on to be heard upon the rule issued against W. T. Nugent to pay over to the trustee the sum of $14,435.95, came W. T. Nugent in person and by counsel, and filed a response to said rule, which response is filed herewith and made part hereof, marked No. 2. On October 16, 1900, came the trustee and said W. T. Nugent and filed a stipulation to the effect that the depositions of Edward B. Nugent, Charles Chreste, R. I. Nugent, F. E. Corrigan, H. Straus, R. A. McDowell, A. E. Mueller, Miss E. A. Nugent, Miss Isabelle Nugent, T. H. Merrimee, Wm. J. Kinsella and Morris Stern, heretofore taken in this cause, might be read upon the hearing of said rule and response, without waiving any exceptions or objections of the said W. T. Nugent to the jurisdiction or to the relevancy or competency of said evidence, which depositions in one batch I return herewith marked No. 3.

The testimony shows, and I so find, that on the 9th day of February, 1900, the bankrupt, Edward B. Nugent, borrowed from George L. Everbach and Frank Hohmann, executors, the sum of $4,500, and as security therefor executed a mortgage upon the house and lot of land owned by said Edward B. Nugent, in the city of Louisville; that after paying the taxes and expenses of procuring the loan there remained from said sum so borrowed the sum of $4,133.45; that on said day the said balance of $4,133.45 was delivered to said W. T. Nugent as the agent of the bankrupt, and the said amount has not been accounted for to the trustee in bankruptcy herein.

I further certify that on the 19th day of February, 1900, before the hour of 2 o'clock p. m., being more than three hours before the petition praying for an adjudication of said Edward B. Nugent as bankrupt was filed in the clerk's office of said court, the stock of merchandise belonging to the bankrupt was sold to one Hermann Straus for the sum of $12,000, and on said 19th day of February, 1900, and before the hour of 2 o'clock p. m., the said $12,000 was paid to said bankrupt by said Hermann Straus in the form of a

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check on the German Bank, of Louisville, Ky.; that said bankrupt endorsed his name across the said check and delivered the same to said W. T. Nugent, his son, as his agent; that said W. T. Nugent received the cash upon said check on that day before the hour of 2 o'clock p. m., and paid therefrom the sum of $1,900 for rental on the building where said stock was located and the expenses
21 of making the sale, leaving the sum of $10,100, which then and there still remained in the hands of said W. T. Nugent as the agent of said bankrupt. I further find that both of said balances, to wit, $4,133.45 and $10,100, belonged to the said bankrupt and became and still *is* the property of Arthur E. Mueller, trustee in bankruptcy in this cause, and that said W. T. Nugent holds the same as agent or bailee only, and that he has not accounted for any part of said sums.

Upon the hearing of said cause I thereupon entered an order, which is as follows, to wit:

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of WAYNE KNITTING MILLS, &c.,
*vs.*
EDWARD B. NUGENT, Bankrupt.

*Copy of Order.*

At Louisville, in said district, on the 16th day of October, A. D. 1900, before John B. Baskin, referee in bankruptcy.

This cause coming on to be heard upon the rule issued against W. T. Nugent to pay over to the trustee the sum of $14,435.95, a copy of which rule was served upon W. T. Nugent on the 8th day of October, 1900, and upon the response filed by the said W. T. Nugent to said rule, comes the trustee in person and by his counsel, W. W. Watts and T. W. Spindle; also came W. T. Nugent in the custody of the United States marshal and by his counsel, W. M. Smith and Fred Forcht, Jr.

Then came counsel and filed a stipulation, which is as follows, to wit:

"It is stipulated between the trustee by his counsel, W. W. Watts, and W. T. Nugent, by W. M. Smith, and Fred Forcht, Jr., his counsel, as follows, both the trustee and W. T. Nugent being also present in person:

"Said W. T. Nugent, without waiving any objection or exceptions as to jurisdiction, relevancy or competency, agrees that the evidence heretofore taken in this cause in the matter of Edward B. Nugent, bankrupt, to wit, the depositions of E. B. Nugent, Charles Chreste, R. I. Nugent, F. E. Corrigan, H. Straus, R. A. McDowell, A. E. Mueller, Miss E. A. Nugent, Miss Isabelle Nugent, T. H. Mer-
22 rimee, Wm. J. Kinsella and Morris Stern, may be read on the hearing of the response to the rule issued against him

herein on April 13th, 1900, but said W. T. Nugent does except and object to said testimony on the ground of relevancy and competency, and also upon the ground that this court has no jurisdiction either to issue said rule or to try him on the questions herein involved.

W. M. SMITH,
ZACK PHELPS,
FRED FORCHT, JR.,
*Att'ys for W. T. Nugent.*
W. W. WATTS,
*Att'y for Mueller, Trustee.*"

And after hearing counsel, now therefore it is ordered and adjudged that the said response to the rule aforesaid be and the same is hereby held insufficient; and it appearing from the evidence in this cause that there came to the hands of W. T. Nugent $4,133.45, being the net proceeds realized from the mortgage executed by the bankrupt upon his house and lot in the city of Louisville, and that there also came to the hands of said W. T. Nugent the further sum of $10,100, being the net proceeds from the sale of the stock of merchandise sold to Herman Straus—the first of said sums having come to the hands of said W. T. Nugent as the agent of the bankrupt on February 9th, 1900, and the second sum, to wit, $10,100, having come to the hands of said W. T. Nugent as the agent of the bankrupt on February 19th, 1900, before the hour of 2 o'clock p. m., on said day, and it further appearing that the petition of the Wayne Knitting Mills and others, praying that the said Edward B. Nugent may be adjudged a bankrupt, was filed in the office of the clerk of the above-styled court on February 19th, 1900, at 5 o'clock p. m., and it appearing that said W. T. Nugent has failed to pay over said sums, or any part thereof, to the trustee in bankruptcy herein, and that said sums are the property of the bankrupt, Edward B. Nugent, and belong to said trustee as part of said estate, it is ordered that said rule be and the same is hereby made absolute to the amount of said two sums aggregating the sum of $14,233.45.

It is further ordered that said W. T. Nugent be and he is hereby required to pay to Arthur E. Mueller, trustee in bankruptcy in this cause, on or before 9:30 o'clock a. m. on October 17th, 1900, the said aggregate sum of $14,233.45.

JOHN B. BASKIN,
*Referee in Bankruptcy.*

25 On the 17th day of October, 1900, came W. T. Nugent, by his counsel, and filed a petition praying that the said order of October 16th, 1900, above set forth in full may be reviewed by the honorable judge of this court, which petition is attached hereto marked No. 4.

And the said question, to wit, the validity of the said order of October 16th, 1900 above set forth in full, is certified to the judge for his opinion thereon.

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Dated at Louisville, the 17th day of October, A. D. 1900.

JOHN B. BASKIN,
*Referee in Bankruptcy.*

A copy.
Attest: [SEAL.] THOS. SPEED, *Clerk.*

Filed Nov. 10, 1900.

FRANK O. LOVELAND, *Clerk.*

EXHIBIT No. 5.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of WAYNE KNITTING MILLS, &c., )
*vs.*
EDWARD B. NUGENT, Bankrupt. )

*Response of W. T. Nugent.*

Defendant, W. T. Nugent, for response to the order made herein on April 13, 1900, requiring him to appear and show why he shall not be required to pay $14,435.95 to the trustee herein, says, that as shown by the pleadings, records and the evidence in this case taken, and the entire proceedings had herein, neither the court or the referee in bankruptcy herein, has any jurisdiction either of this respondent or the matter involved, to make any order or to require this respondent to answer thereto, because he says that said records herein show, that, if respondent received said money or any part thereof, it was before the petition in bankruptcy was filed, and in that event neither the court or the referee in bankruptcy can proceed against this respondent as herein attempted by order or rule to pay, and he now hereby asks that this be taken as his response herein, and that said order be set aside and vacated. He says that at no time since the filing of the petition in bankruptcy herein, has he received said $14,435.95 or any part thereof.

Defendant, for further response herein, says that he ought not be required to respond as to the matters herein set forth or any of them, because he says that within the last few days he has been indicted in the district court of the United States for the district of Kentucky, sitting at Louisville, charged with the offense of receiving said $14,435.95 after the filing of the petition in bankruptcy against E. B. Nugent, and also with retaining same and aiding and abetting in the retention thereof both after the filing of said petition and the adjudging of said Nugent a bankrupt thereunder for the purpose of defeating the bankrupt law. He says that said indictment is still pending undetermined, and his response herein in regard to these matters would tend to criminate him thereunder. He says that this indictment grew out of the transactions upon which this litigation is based and said indictment is based upon the identical transactions that he is now called upon to respond in reference thereto, and that he is now in jail under said charge awaiting trial and to compel

him to respond herein would deprive him of the constitutional right guaranteed to him by the constitution, that is, that he shall not be compelled to give evidence as against himself.

And now having fully responded herein, he prays that the order herein be set aside and vacated and that he be dismissed from further response thereto.

W. T. NUGENT.

Subscribed and sworn to before me this 13th day of October, 1900, by W. T. Nugent.

My commission as notary public expires January 12th, 1902.

FREDERICK FORCHT, JR.,
*N. P., J. C., Ky.*

ZACK PHELPS,
FRED. FORCHT, JR.,
W. M. SMITH,
*Att'ys for Respondent.*

Response to rule filed with referee Oct. 13, 1900, 9:30 o'clock a. m.

JOHN B. BASKIN,
*Referee in Bankruptcy.*

A copy.
Attest: [SEAL.] THOS. SPEED, *Clerk.*

Filed Nov. 10, 1900.

FRANK O. LOVELAND, *Clerk.*

25

EXHIBIT No. 6.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of WAYNE KNITTING MILLS, &c.,
*vs.*
EDWARD B. NUGENT, Bankrupt.

*Report of Referee.*

I, John B. Baskin, one of the referees in bankruptcy of this court, do respectfully report that on the 16th day of October, 1900, I entered an order requiring W. T. Nugent to pay to Arthur E. Mueller, trustee in bankruptcy in this cause, on or before 9:30 o'clock a. m., October 17th, 1900, the sum of $14,233.45 which came to his hands as bailee or agent of the bankrupt, Edward B. Nugent, which sum said W. T. Nugent has not accounted for.

At the time of the entry of said order said W. T. Nugent was before me in person and by counsel, W. M. Smith and Fred Forcht, Jr. A copy of said order is filed herewith and made part hereof, marked No. 1.

I further certify that said W. T. Nugent has failed to comply with said order in whole or in part.

I therefore find that said W. T. Nugent is in contempt of court,

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and therefore recommend that he be punished for contempt and committed to prison until he shall have paid to the said trustee the said sum of $14,233.45.

All of which is respectfully submitted.

[SEAL.]

JOHN B. BASKIN,
*Referee in Bankruptcy.*

A copy.
Attest: THOS. SPEED, *Clerk.*

Filed Nov. 10, 1900.

FRANK O. LOVELAND, *Clerk.*

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EXHIBIT No. 7.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

*In re* WAYNE KNITTING MILLS CO., &c., )
*vs.* )
E. B. NUGENT. )

*Petition for Review.*

Comes W. T. Nugent, by counsel, and files herewith his petition for review of the order of the referee entered herein on Oct. 16th, 1900, and says that said referee erred in ordering and adjudging as insufficient his response to the rule filed herein on October 13th, 1900; that said referee erred in adjudging that there came to the hands of said W. T. Nugent as the agent of the bankrupt, on Feb. 9th, 1900, the sum of $4,133.45, being the net proceeds realized from the mortgage executed by the bankrupt upon his house and lot in the city of Louisville; that said referee erred in adjudging that there came to the hands of said W. T. Nugent, as the agent of the bankrupt on Feb. 19th, 1900, the further sum of $10,100.00, being the net proceeds from the sale of the merchandise sold to Herman Straus; that said referee erred in adjudging that said sums are the property of the bankrupt, Edward B. Nugent, and belong to Arthur E. Mueller, trustee in bankruptcy herein of said estate; that said referee erred in ordering that said rule be made absolute to the amount of said two sums aggregating the sum of $14,233.45; that said referee erred in ordering and requiring said W. T. Nugent to pay to Arthur E. Mueller, trustee in bankruptcy in this cause on or before 9:30 o'clock on Oct. 17th, 1900, the said aggregate sum of $14,233.45, and said referee erred in entering said order on Oct. 16th, 1900, a copy of which is filed herewith, that said order is erroneous and void, and said referee had no jurisdiction to enter same.

Wherefore, said W. T. Nugent prays that said order entered herein by the referee on Oct. 16th, 1900, be reviewed by the honor-
27 able judge of the district court of the United States for the

district of Kentucky, and that said order be adjudged erroneous and void.

W. M. SMITH,
ZACK PHELPS,
FRED FORCHT, JR.,
*Att'ys for W. T. Nugent.*

A copy.
Attest: THOS. SPEED, *Clerk.*

Filed Nov. 10, 1900.

FRANK O. LOVELAND, *Clerk.*

EXHIBIT 8.

In the District Court of the United States for the District of Kentucky.

NOVEMBER 1ST, 1900.

In the Matter of WAYNE KNITTING MILLS, &c., *vs.* EDWARD B. NUGENT, Bankrupt. } In Bankruptcy.

This cause coming on to be heard on the petition of William T. Nugent for a review of the order of court entered herein by John B. Baskin, one of the referees of this court, requiring William T. Nugent to pay over to Arthur E. Mueller, trustee in bankruptcy of the bankrupt herein, and the certification of said referee as to the disobedience of said William T. Nugent of said order and the recommendation of said referee that said William T. Nugent be punished for his contempt of the order of this court, and the court being fully advised, the court delivered a written opinion which is now ordered filed herein.

Thereupon came said William T. Nugent, by counsel, and moved the court to postpone the entry of judgment in said matter until Saturday, November 3, 1900, and it is so ordered.

A copy.
Attest: [SEAL.] THOS. SPEED, *Clerk.*

Filed Nov. 10, 1900.

FRANK O. LOVELAND, *Clerk.*

28 EXHIBIT No. 9.

United States District Court, District of Kentucky. In Bankruptcy.

WAYNE KNITTING MILLS ET AL. *vs.* E. B. NUGENT, Bankrupt. } Opinion.

In this case the petition in involuntary bankruptcy was filed against the bankrupt about 5 o'clock p. m., February 19th, 1900. Some hours earlier on that day the bankrupt, who for many years

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had been a prominent retail dry-goods merchant in the city of Louisville, Ky., sold and delivered to Herman Straus, another retail dry-goods merchant in the same city, his entire stock of merchandise, which was thereafter very speedily removed to the latter's store. The agreed price was $12,000, and early in the afternoon of the same day a check on the German bank, for the amount, payable to the bankrupt, was given by the purchaser to him. He at once endorsed it, and handed it to his son and agent, W. T. Nugent, the respondent, to get for him the cash upon the check, which by 2 o'clock p. m. the respondent had done.

On the 9th day of February, 1900, the bankrupt had mortgaged the house and lot in Louisville, in which he resided, to George L. Everbach and Frank Hohmann, executors, for $4,500, and this money, on the same day or soon thereafter, came to the hands of the respondent as agent of his father.

Out of the $12,000 thus obtained there were paid certain sums which are not in controversy, and out of the $4,500 thus obtained certain other sums were paid, about which we need not concern ourselves. But at the time of the filing of the petition, and at the time of the adjudication, on March 23, 1900, the respondent held in his hands, as custodian and agent for his father, $10,000 received on the $12,000 check and $4,133.45 received out of the proceeds of the mortgage. The creditors appointed Arthur E. Mueller, trustee for the bankrupt's estate, and he on the 13th day of April, 1900, filed a petition before the referee asking for a rule against the bankrupt to show cause why he should not be required to pay the two sums last above mentioned, amounting to $14,233.45, to the trustee. The bankrupt appeared and in substance stated in his response to the rule that the entire sum was in the
29 hands of his son, who had gone he knew not whither, and he found it impossible to pay the money for that reason. The referee, thinking this response insufficient, so adjudged, and ordered the bankrupt to pay the entire sum to the trustee. The bankrupt failing to do this, the referee held him to be guilty of contempt, and reported his action to the court with the recommendation that the bankrupt be punished therefor.

Pending the action of the court upon this report and recommendation, the bankrupt's counsel suggested to the court that the bankrupt, then about 80 years of age, was mentally unsound. Whereupon the court ordered, and late in June, 1900, had a special hearing upon this phase of the case, and was of opinion from the evidence of the medical experts that approaching senile imbecility possibly then made the bankrupt an unfit subject of punishment or of the summary processes of the court. At all events he was given the benefit of the doubt.

For several months thereafter the son, W. T. Nugent, the respondent, had continued in hiding, but in October, 1900, was found, and soon afterwards was indicted in this court upon charges of receiving and concealing certain assets of the bankrupt.

On the 13th day of April, 1900, upon the petition of the trustee, the respondent, W. T. Nugent, was enjoined from disposing of all

or any part of the said sum thus in his hands, and was then ordered to show cause, if any he could, within five days from the service of a copy of the order, why he should not be required to pay said sum of money to the said trustee. A copy of that order was served upon the respondent on October 8th, 1900. On the 13th day of October he filed his sworn response in the following language:

"Defendant, W. T. Nugent, for response to the order made herein on April 13, 1900, — required to pay $14,435.95 to the trustee herein says, that, as shown by the pleadings, records, and the evidence in this case taken, and the entire proceedings had herein, neither the court or the referee in bankruptcy herein has any jurisdiction either of this respondent or the matter involved to make any such order or to require this respondent to answer thereto, because he says that said records herein show that if respondent received said money or any part thereof it was before the petition in bankruptcy was filed, and in that event neither the court or the referee in bankruptcy can proceed against this respondent as herein attempted by order or rule to pay, and he now hereby asks that this be taken as his response herein and that said order be set aside and vacated. He says that at no time since the filing of the petition in bankruptcy herein has he received said $14,435.95 or any part thereof.

Defendant for further response says that he ought not to be required to respond as to the matters herein set forth or any of them, because he says that within the last few days he has been indicted in the district court of the United States for the district of Kentucky, sitting at Louisville, charged with the offense of receiving said $14,435.95 after the filing of the petition in bankruptcy against E. B. Nugent, and also with retaining same and aiding and abetting in the retention thereof both after the filing of said petition and the adjudging of said Nugent a bankrupt thereunder for the purpose of defeating the bankrupt law. He says that said indictment is still pending undetermined, and his response herein in regard to these matters would tend to criminate him thereunder. He says that this indictment grew out of the transactions upon which this litigation is based and said indictment is based upon the identical transactions that he is now called upon to respond in reference thereto, and that he is now in jail under said charge awaiting trial, and to compel him to respond herein would deprive him of the constitutional right guaranteed to him by the constitution, that is, that he shall not be compelled to give evidence as against himself.

And now, having fully responded herein, he prays that the order herein be set aside and vacated, and that he be dismissed from further response thereto.

W. T. NUGENT."

Upon a hearing thereof the referee adjudged that the response was insufficient and no further response was tendered. Whereupon the rule was made absolute, and on October 16th the respondent was ordered to pay to the trustee, at 9:30 o'clock a. m., of the next day, the sum of $14,233.45, being the amount in his hands in the manner

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stated and belonging to the bankrupt's estate. The respondent having failed to obey this order, or to pay any part of the money, the referee adjudged him to be in contempt, and recommended that the court impose a punishment therefor. The court finds the facts of the case to be as above stated, with the addition that the entire amount, $14,233.45, is the property of the bankrupt's estate alone; that it had been taken possession of, and was held by W. T. Nugent as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim of right to it by reason of any attempted
31 transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in anywise to have claimed it adversely to the bankrupt or the trustee.

The court is asked to review the said orders of the referee of October 16, 1900, which required the payment of the money by respondent, and which adjudged him to be in contempt for his failure to do it.

The response of W. T. Nugent, as will be seen from reading it, is put entirely upon two grounds. The first is, that the court and referee are without jurisdiction in the premises, and the second is, that respondent had been recently indicted for certain offenses against the laws of the United States growing out of the transaction respecting the money. Inasmuch as any indictment in the premises must be presumed (in the absence of copies which respondent has failed to produce) to be under section 29 of the bankrupt act, and as no offense there provided for is at all similar to the one which the referee held to be a contempt, viz., the failure to obey the orders indicated, that part of the response which refers to the indictment is so manifestly insufficient as to require no further treatment. It is not claimed by respondent that he is indicted for disobeying that order.

The important inquiry is, Had the referee power to make the order requiring payment by respondent of the moneys? If not, the matter is at an end, but if he had the power, then it follows almost as matter of course that the refusal to obey the order was a contempt which the court may punish under the express provisions of the act. Those provisions are found in section 2 of the act, and give to the courts of bankruptcy power "(6) to bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;" (7) "to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto," (13) "to enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;" (15) "to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." And (16) "to punish persons for contempts committed before referees." Section 41 provides that "A person shall not in proceed-

ings before a referee, disobey or resist any lawful order, process, or writ."

32 It is contended that as the money was delivered to respondent before the petition in bankruptcy was filed, as matter of law, he must be regarded as an adverse holder of it, and that the only remedy left in such a case is a civil action under section 23 of the act, of which this court would have no jurisdiction, and authorities are cited to show that where there was an adverse possession of money or property it was held that such a proceeding only and not a summary one was available, and doubtless those authorities correctly state the law applicable to such a condition of fact. But that does not seem to be this case.

It is contended that the money in this case must be regarded as having been converted by the son to his own use before the bankruptcy proceedings were instituted, and that there was consequently an adverse possession, but this would require the court to do what the bankrupt did not venture to do in his response, notwithstanding the fact that there is nothing in section 29 which makes it an offense to have received any money or property of the bankrupt before the filing of the petition. This contention of counsel, based upon no fact stated in the response, would therefore require the court to find, as matter of fact, that the respondent had converted this money to his own use, and to have had an adverse right to it, as against his father, before 5 o'clock p. m., February 19th, 1900. There is absolutely nothing in the record to warrant or to support such a conclusion, and the court declines to reach it. There is no pretense that he held it, up to that time, nor up to the time of adjudication, otherwise than as a mere agent and custodian, nor is there any proof which would warrant the conclusion that this money, or any part of it, was, before the hour of filing the petition, transferred to respondent in fraud of the creditors, nor, indeed, is there any claim in the response to that effect. The response is wholly silent as to whether the respondent has squandered the money or still has it on hand. This silence is, *per se*, a forcible suggestion that it is still in his possession.

If, as it clearly appears to the court was the fact, there was nothing but an agency upon respondent's part to receive this money as custodian thereof for his father, and if, as it also appears, this was in fact done, then the property in legal contemplation remained in the bankrupt's possession at the time of the filing of the petition, and also at the time of the adjudication. If this be so, then the respondent thereafter held it for the benefit of the trustee, who was

33 substituted to the position of principal to this agent, and for whose benefit the agent thereafter held it, and it was the plain and manifest duty of the respondent under these circumstances, and having regard to that relation, to pay it over to the trustee instead of running off with it.

Under the powers conferred upon the referee by the bankrupt act, and in his efforts to reduce the cash and administer the assets of the bankrupt, it seems to me clear that after bringing the respondent before the court by service of the rule, and in this way probably

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making him a party to the proceedings, which are meant to be quite informal, the referee had the power to order this custodian of his money belonging to this bankrupt's estate to deliver the same to the trustee, to the end that it might be administered in due course. This was done in a summary way, it is true, but not until respondent was duly served with the process applicable to such a proceeding, and not until he had responded and virtually admitted the possession of the money, which, after adjudication, was practically in the custody of the law.

It is probably as correct to state of proceedings under the present law as it was to state of them under the act of 1867, that the filing of the petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction (Bank *vs.* Sherman, 10 U. S., 106).

Under section 70 of the present act the title of the trustee relates back to the date of adjudication with certain specified exceptions, the only pertinent one of which appears to be that of "property transferred by the bankrupt in fraud of his creditors." There is no claim made in the response that the money in the respondent's hands was ever so transferred to him. Indeed, we have the simple case of a bailee of the bankrupt as such, holding the custody of certain money which came to his hands in the manner stated, and which he has been ordered to pay or deliver to the trustee, the officer of the court, who, by operation of law, has been substituted to all the rights of the bankrupt in that property. The court, in its opinion, has jurisdiction to enforce obedience to that order, although the respondent is not the bankrupt, but "another person," which, as appears to be the case here, he is properly before the court upon the rule and his response thereto. The case is somewhat similar to a proceeding *in rem*, and the court is but dealing with property which, under the facts of the case, is potentially in the custody of the law.

The opinion of Judge Wheeler in the case *In re* Brooks,
34 91 Fed. Rep., 508, is very satisfactory upon the question of jurisdiction. Light is also thrown upon it by the opinion in White *vs.* Schloerb, 178 U. S., 547–'8.

There could easily and safely have been a denial by respondent of the charge of receiving or concealing the money, or, failing in making a denial available for his purposes, there could have been a payment of the money into court. Neither was done. Any dilemma in which the respondent may find himself involved by reason of the indictment is of his own creation. If the suggestion, or rather hint, of its existence was made for the mere purpose of avoiding or evading the duty of making his response a direct statement of his reasons for not delivering up the money in his hands, it is well that the court is not bound, without either statement or proof, to assume that the difficulty is real and not affected and offered merely with the hope of its being available as a convenient and possibly ingenious mode of avoiding either a frank statement of the facts or else a denial of what is alleged against him.

In the absence of either of these the claim of danger of self-in-

crimination seems for the most part to be a mere abstraction, and in nowise a real difficulty. To the extent of being abstract or not well founded it is not a proper or sufficient barrier behind which to hide this large sum from the court and the creditors.

While the respondent may prudently and rightfully choose not to criminate himself by any statement in his pleadings, there was urgent occasion to show facts of exculpation, and in the nature of things this could hardly criminate him, but the vice of the response is that it does not do it, nor does the respondent see fit to plead in such a way as to show that he is not guilty, although such a pleading could not possibly criminate him. He substantially rests the case upon a denial of jurisdiction in the court, and not upon any defense to the merits.

Our conclusion is that upon the grounds indicated this case appears to call in the most vehement manner upon the court to exert all its powers to get this large sum of money out of the hands of this unfaithful bailee for the benefit of the bankrupt's creditors. Over $14,000, which manifestly belongs to the creditors and not in any sense to the respondent, have been received by the latter in the manner indicated, and is held by him under circumstances which present no appeal to the sympathies of any right-thinking man, and if under the facts shown his retention of this fund may be allowed, and if such retention is sanctioned by the court, and if it be so easy by this species of jugglery between a bankrupt father and his
35 son—if that be so easy of accomplishment—the rights of creditors in such cases may be defeated with an ease and completeness that would make involuntary proceedings in bankruptcy a somewhat laughable mockery. This characteristic will not be willingly impressed upon such proceedings by this court.

Of the contention of respondent that he cannot respond freely lest he criminate himself, it may be further remarked that there was the easiest possible way to avoid this by paying the money into court, and there making any claim to it that he had, so that the questions could be settled here. There has been no effort made either to pay the money or to state any fact to enable the court to decide whether the respondent has any sort of claim to it or any reason to present why he should not place it where the creditors who are entitled to it may get it.

To sum up the whole matter: The respondent has the money in his hands as agent or bailee only. His possession is that of his principal. His principal was his father up to a certain stage of these proceedings, but whether up to the filing of the petition or up to the adjudication we need not stop to inquire, as it is immaterial in this case. At one or the other of those times his principal, by operation of law, was changed, and an officer of this court was substituted for his father. That change in no way lessened the duty of paying the money to the proper principal upon notice and demand. After the change, however, the money was potentially in the custody of the law in these proceedings, and subject to the orders of the court. The rule and its service constituted sufficient notice and demand. The order made was that the respondent should pay the money to the

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proper officer. Disobedience of that order is made punishable as a contempt by the express provisions of the act.

The court, therefore, has jurisdiction of the person and of the subject-matter, the rulings of the referee appear to be right, and are approved and confirmed, and his recommendation as to punishing the respondent for the contempt adjudged will be acted upon with appropriate vigor.

Under the authority of section 725 R. S., and the cases of Tinsley *vs.* Anderson, 171 U. S., 107, and *In re* Swan, 150 U. S., 637, the judgment of the court, in the exercise of its statutory discretion, will be that the respondent, W. T. Nugent, for his contempt aforesaid, be imprisoned in the county jail until he shall deliver to Arthur E. Mueller, the trustee, said sum of $14,233.45, and the court will reserve the right to suspend or set aside this judgment and sentence upon the delivery and payment of the money as ordered.

Nov. 1, 1900.

WALTER EVANS, *Judge.*

A copy.
Attest:

THOS. SPEED, *Clerk.*
By HENRY F. CASSIN, *D. C.*

Filed Nov. 10, 1900.

FRANK O. LOVELAND, *Clerk.*

EXHIBIT No. 10.

District Court of the United States for the District of Kentucky.

NOVEMBER 3RD, 1900.

In the Matter of WAYNE KNITTING MILLS, &c.,
*vs.*
EDWARD B. NUGENT. } In Bankruptcy.

Came William T. Nugent, respondent herein, and tendered an amended response, and moved to file same, and the court not having postponed the imposing of the sentence for that purpose, and being of opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed.

And thereupon pursuant to the opinion of the court, filed herein on the 1st instant, it is the judgment of the court that William T. Nugent for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson county, Kentucky, until he shall deliver or pay to Arthur E. Muller for the trustee herein, said sum of $14,233.45, or otherwise satisfy the said trustee with respect thereto, and the court reserves the right and power to suspend or set aside the judgment and sentence upon the delivery, payment or satisfaction aforesaid.

To all of which the respondent, William T. Nugent, excepts.

A copy.
Attest: [SEAL.] THOS. SPEED, *Clerk.*
Filed Nov. 10, 1900.

FRANK O. LOVELAND, *Clerk.*

37 EXHIBIT No. 11.

United States District Court, District of Kentucky.

WAYNE KNITTING MILLS ET AL. *vs.* E. B. NUGENT, Bankrupt. } Amended Response.

Defendant, W. T. Nugent, by way of amended response herein, files herewith a copy of the indictment against him referred to in his original response and marks same "W. T. N." and filed same as an exhibit herein and as part of this response. He says that while it is true that the referee held his response herein as insufficient, he says that it is further true that said referee stated and held, at the time that he could not be required to respond herein as to matters that had a tendency to incriminate him under said indictment and refused to permit him to be examined by said trustee as to any matters or transactions directly or indirectly relating to the transactions involved in said indictment. Respondent says, that believing as he did and being advised that he could not be legally required to respond to any such transaction and by reason of said ruling of the referee, he did not make his full response as to the entire facts.

He now asks to amend said response and states that he has not the $14,233.49, or any part thereof now in his possession or under his control, and did not have same in his possession or under his control, or under his control at the time the process was served on him herein on October 8, 1900, nor did he have any notice of any injunction herein until said service. He says that neither at the time of the filing of the petition in bankruptcy herein against E. B. Nugent or at any time subsequent thereto, did he have in his hands any amount of money belonging to said Nugent which he held as his agent or bailee. He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent or any such money at any subsequent date thereto, was not received or held by this respondent as agent or bailee or in any trust capacity whatever, but was held adversely to said E. B. Nugent.

And he prays as in his original response.

W. T. NUGENT.

38 Subscribed and sworn to before me by W. T. Nugent this 2nd day of November, 1900. Z. PHELPS,
*N. P., J. Co., Ky.*

Commission expires January 8th, 1902.

A copy.
Attest: [SEAL.] THOS. SPEED, *Clerk.*

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United States District Court, District of Kentucky.

UNITED STATES OF AMERICA, }
*District of Kentucky,* } *set:*

In the District Court of the United States for the Sixth Judicial Circuit and District of Kentucky, Held at Louisville, Kentucky, October Term, in the Year of Our Lord Nineteen Hundred.

First count. The grand jurors of the United States of America, impaneled and sworn, and charged to inquire in and for the district of Kentucky, on their oaths present, that W. T. Nugent did on the first day of October, nineteen hundred, in the district aforesaid and within the jurisdiction of this court unlawfully, knowingly and fraudulently receive a material part of the money and personal property of E. B. Nugent, to wit, the sum of ten thousand dollars in lawful money of the United States, which was then and there paid to the said W. T. Nugent by Herman Straus—a more particular description thereof is to the grand jurors aforesaid unknown; a certain check drawn by Edmund F. Trabue on the Southern National Bank of Louisville, Kentucky, in favor of E. B. Nugent & Co., for two dollars, dated February 21, 1900, and numbered 78, with the fraudulent intent on the part of the said W. T. Nugent to defeat the provisions of an act of the Congress of the United States, entitled, "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and that said money, personal property and check were then and there personal property of the said E. B. Nugent, as the said W. T. Nugent then and there knew—and that a petition then and there seeking to have the said E. B. Nugent adjudged a bankrupt had been then and there filed in the office of Thomas Speed, who was then and there duly appointed, qualified and acting clerk of the United States district court for the district aforesaid, at Louisville, Kentucky, where the said E. B. Nugent had then resided and had his domicile for more than six months, by the Wayne Knitting Mills, Belding Bros. & Co.
39 and the German Insurance Bank, as the said W. T. Nugent then and there knew and that the said E. B. Nugent was then and there insolvent and bankrupt as the said W. T. Nugent then and there knew.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

Second count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that W. T. Nugent did on October 1, 1900, in the district aforesaid and within the jurisdiction of this court, unlawfully, knowingly and fraudulently, while E. B. Nugent was a bankrupt aid, abet and assist the said E. B. Nugent in concealing, and did then and there unlawfully, knowingly and fraudulently while the said E. B. Nugent was a bankrupt, procure the said E. B. Nugent to conceal a large amount of his, the said E. B. Nugent's personal property, to wit, the sum of ten thousand dollars, lawful money of the United States, which was then and there paid to the said W. T. Nugent by Herman Straus, a more particular description

whereof is to the grand jurors aforesaid unknown, from A. E. Mueller, who was then and there the duly appointed, qualified and acting receiver and trustee of the estate of the said E. B. Nugent in bankruptcy, and the said E. B. Nugent then and there was and had then and there been adjudged a bankrupt, as the said W. T. Nugent then and there knew, by the United States district court at Louisville, in the district court aforesaid, where the said E. B. Nugent had then resided and had his domicile for more than six months and the personal property aforesaid was then and there the personal property of the said E. B. Nugent and then and there belonged to his said estate in bankruptcy, as the said W. T. Nugent then and there knew.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

Third count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that W. T. Nugent did on October 1, 1900, in the district aforesaid and within the jurisdiction of this court, unlawfully, knowingly and fraudulently, while E. B. Nugent was a bankrupt conceal a large amount of the personal property of the said E. B. Nugent, to wit, the sum of ten thousand dollars in lawful money of the United States, which was then and there paid to the said W. T. Nugent by Herman Straus—a more particular description whereof is to the grand jurors aforesaid unknown—
40 from A. E. Mueller, who was then and there the duly appointed, qualified and acting receiver and trustee of the estate of the said E. B. Nugent in bankruptcy—and the said E. B. Nugent then and there was and had then and there been adjudged a bankrupt as the said W. T Nugent then and there knew, by the United States district court at Louisville, in the district aforesaid, where the said E. B. Nugent had then resided, and had his domicile for more than six months, and the personal property, aforesaid, was then and there the personal property of the said E. B. Nugent, and then and there belonged to the said estate of the — E. B. Nugent, in bankruptcy, as the said W. T. Nugent then and there knew.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

R. D. HILL,
*United States Attorney, District of Kentucky.*

Witnesses:

HERMAN STRAUS.
A. E. MUELLER.
MORRIS STERN.

[SEAL.]

Filed Nov. 10, 1900.

FRANK O. LOVELAND, *Clerk.*

EXHIBIT No. 12.

Examined by W. W. WATTS, for trustee:

Q. 1. Mr. Nugent, you are William T. Nugent, the son of E. B. Nugent, the bankrupt, in this case?

A. That is my name; yes, sir.

Q. 2. You had something to do with the sale of the stock of goods in the store of E. B. Nugent to Herman Straus, on the 19th day of February, 1900, did you not?

Counsel for W. T. Nugent objects to the witness answering this question because within the last few days he has been indicted in the district court of the United States, for the district of Kentucky, sitting at Louisville, charged with the offense of receiving the sum of $14,435.95 after the filing of the petition in bankruptcy against E. B. Nugent, and also with retaining same, and aiding and abetting in the retention thereof, both after the filing of said petition and the adjudging of said E. B. Nugent a bankrupt, thereunder, for the purpose of defeating said bankrupt law, and said indictment is
41 still pending undetermined, and that if he answers the said question in regard to these matters it would tend to criminate him thereunder; that said indictment grew out of the transactions to which the question just asked relates, and upon which this litigation is based, and said indictment is based upon the identical transactions which said question refers to and relates to, and that the witness is now in jail under said charge awaiting trial under said indictment, and that to compel him to answer said question would deprive him of the constitutional right guaranteed him by the Constitution, that is, that he shall not be compelled to give evidence against himself.

The witness declines to answer upon the ground that it would incriminate him.

The referee rules that the witness need not answer.

Q. 3. Mr. Nugent, you were employed in the store of your father for a long period of time, were you not?

A. Yes, sir; good many years.

Q. 4. Were you familiar with the stock of goods in his store—familiar with its value?

A. You mean the gross amount of the stock?

Q. 5. Yes, and familiar generally with the stock of goods there?

A. No, I don't think I was, sir; I don't believe I was, the exact amount.

Q. 6. Do you know anything of an inventory of the stock that was taken just previously to a sale of the goods?

A. No; I don't remember it now.

Q. 7. I will ask you if it isn't true that an inventory was taken just previously to the sale, and that under that inventory the stock of goods was shown to be of the value of about $26,000?

A. I couldn't tell anything about that unless I saw the inventory

now, and I don't know that I saw the inventory; they didn't take it, I don't think.

Q. 8. You don't know that an inventory was taken?

A. I saw them taking it, but I don't know whether it was—whether the total amount was ever extended or added up; I didn't see that part.

Q. 9. Did you have anything to do with the taking of that inventory?

A. Nothing only writing.

Q. 6. Were you sufficiently acquainted with the taking of that inventory to say upon what basis the prices of goods were fixed in the inventory?

A. No, sir; that was regulated by the book-keeper.

Q. 7. Do you know whether the prices of goods as fixed by the inventory were fixed at the selling or the cost price of the goods, or some other price or basis?

42 A. Well, there was some of the stock, I suppose was taken at the selling price, and the book-keeper would arrange the balance or whatever profit was put on them or something of that sort; he had the whole thing in charge.

Q. 8. You are not then sufficiently informed to give us any definite information about that; is that what I am to understand?

A. No, I couldn't give you any.

Q. 9. I hand you an insurance policy issued by the Phœnix Assurance Company to E. B. Nugent, dated May 2, 1898, and expiring May 2, 1901, by which it is purported that the household furniture and other things situated at No. 908 Third street, in Louisville, Kentucky, were insured for $1,500. I will ask you to look at that policy and say whether or not you had anything to do with the issuance of that policy by procuring it, or otherwise?

A. (Examining the policy.) I had nothing to do with it.

Q. 10. Did you know anything of the issuance of that household policy?

A. I had nothing to do with it at all, sir; knew nothing about it.

Q. 11. Do you know anything about the payment of the premium of this policy?

A. No, sir.

Q. 12. To whom, if you know, did the household property at 908 Third street belong?

A. The house itself?

Q. 13. No, not the house; the household property inside.

A. I think it belongs to the girls, it was always theirs.

Q. 14. What makes you think it belongs to the girls?

A. Most of it is very old furniture—was left by their mother.

Examined by T. W. SLINDLE:

Q. 15. What did you have to do, if anything, with the closing up of the transaction by which Mr. Herman Straus bought from E. B. Nugent this stock of goods sold to him?

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Counsel for W. T. Nugent objects to the witness answering this question because within the last few days he has been indicted in the district court of the United States for the district of Kentucky, sitting at Louisville, charged with the offense of receiving the sum of $14,435.95 after the filing of the petition in bankruptcy against E. B. Nugent, and also with retaining same, and aiding and abetting in the retention thereof, both after the filing of said petition and the adjudging of said E. B. Nugent a bankrupt thereunder, for the purpose of defeating said
43 bankrupt law, and said indictment is still pending undetermined, and that if he answers the said question in regard to these matters it would tend to criminate him thereunder; that said indictment grew out of the transactions to which the question just asked relates and upon which this litigation is based, and said indictment is based upon the identical transactions which said question refers to and relates to, and that the witness is now in jail under said charge awaiting trial under said indictment, and that to compel him to answer said question would deprive him of the constitutional right guaranteed him by the Constitution—that is, that he shall not be compelled to give evidence against himself.

The witness declines to answer on the ground that it would incriminate him.

The referee rules that the witness need not answer.

Q. 16. Did you cash the check or receive the proceeds of the check that was given by Herman Straus in the purchase of that stock from E. B. Nugent?

Counsel for W. T. Nugent object to the witness answering this question because within the last few days he has been indicted in the district court of the United States for the district of Kentucky, sitting at Louisville, charged with the offense of receiving the sum of $14,435.95, after the filing of the petition in bankruptcy, against E. B. Nugent, and also with retaining same, and aiding and abetting in the retention thereof, both after the filing of said petition and the adjudging of said E. B. Nugent a bankrupt thereunder, for the purpose of defeating said bankrupt law, and said indictment is still pending undetermined, and that if he answers the said question in regard to these matters it would tend to criminate him thereunder; that said indictment grew out of the transactions to which the questions just asked relates, and upon which this litigation is based, and said indictment is based upon the identical transactions which said question refers to and relates to, and that the witness is now in jail under said charge awaiting trial under said indictment and that to compel him to answer said question would deprive him of the constitutional right guaranteed him by the Constitution—that is, that he shall not be compelled to give evidence against himself.

The witness declines to answer on the ground that it would incriminate him.

The referee rules that the witness need not answer.

Q. 17. Did E. B. Nugent mortgage the house belonging to him on

Third street in Louisville, Ky., to the executors of the Hohman estate or to any one else a short time prior to his bankruptcy?

44 Objected to by counsel for W. T. Nugent as papers in the record show as to this, and they are the best evidence.

Objection sustained.

Q. 18. Did you receive from E. B. Nugent or from any one else a check delivered to E. B. Nugent by the executors of the Hohman estate as the proceeds of a mortgage made by E. B. Nugent on his property on Third street to the executors of the Hohman estate?

Counsel for W. T. Nugent object to the witness answering this question because within the last few days he has been indicted in the district court of the United States for the district of Kentucky, sitting at Louisville, charged with the offense of receiving the sum of $14,435.95, after the filing of the petition in bankruptcy, against E. B. Nugent, and also with retaining same, and aiding and abetting in the retention thereof, both after the filing of said petition and the adjudging of said E. B. Nugent a bankrupt thereunder, for the purpose of defeating said bankrupt law, and said indictment is still pending undetermined, and that if he answers the said question in regard to these matters it would tend to criminate him thereunder; that said indictment grew out of the transactions to which the question just asked relates, and upon which this litigation is based, and said indictment is based upon the identical transactions which said question refers to and relates to, and that the witness is now in jail under said charge awaiting trial under said indictment and that to compel him to answer said question would deprive him of the constitutional right guaranteed him by the Constitution—that is, that he shall not be compelled to give evidence against himself.

The witness declines to answer on the ground that it would incriminate him.

Referee rules that witness need not answer.

Q. 19. Did any portion of the proceeds of that check come into your possession?

Counsel for W. T. Nugent object to the witness answering this question because within the last few days he has been indicted in the district court of the United States for the district of Kentucky, sitting at Louisville, charged with the offense of receiving the sum of $14,435.95 after the filing of the petition in bankruptcy against E. B. Nugent, and also with retaining same, and aiding and abetting in the retention thereof, both after the filing of said petition and the adjudging of said E. B. Nugent a bankrupt thereunder, for the purpose of defeating said bankrupt law, and said indictment is still pending undetermined, and that if he answers the said
45 & 46 question in regard to these matters it would tend to criminate him thereunder; that said indictment grew out of the transactions to which the question just asked relates, and upon which this litigation is based, and said indictment is based upon the identical transactions which said question refers to and

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relates to, and that the witness is now in jail under said charge awaiting trial under said indictment, and that to compel him to answer said question would deprive him of the constitutional right guaranteed him by the Constitution—that is, that he shall not be compelled to give evidence against himself.

The witness declined to answer on the ground that it would incriminate him.

Referee rules that witness need not answer.

Signature of W. T. Nugent to the above deposition is waived by counsel representing the trustee and counsel representing said Nugent.

A copy,
Attest: [SEAL.] THOS. SPEED, *Clerk*.

47 United States Circuit Court of Appeals for the Sixth Judicial Circuit.

W. T. NUGENT's Petition for Review in WAYNE KNITting Mills, Belding Bros. & Company, The German Insurance Bank, Plaintiff,
*vs.*
E. B. NUGENT, Bankrupt, Defendant. } Stipulation.

It is stipulated by counsel for W. T. Nugent, the petitioner, and Arthur E. Mueller, trustee, that in the case of The Wayne Knitting Mills, &c., against Edward B. Nugent, pending in the district court of the United States for the district of Kentucky, Edward B. Nugent was regularly adjudged a bankrupt, and the case was regularly referred to John B. Baskin, a referee at the time of all the proceedings and all the matters complained of by the petitioner herein.

Also that Exhibit No. 12, of the printed record herein, "Deposition of W. T. Nugent," was taken in pursuance of section 21 of the act of 1898 for the general purposes of the estate only, as shown by the caption thereof, and that said deposition has never been certified to the judge of the district court, and same has never been before him under the certificate of said referee, but said deposition was attached to the other depositions certified to the judge and in that manner before the judge.

That the opinion of the court filed at the time of the entry of the "Order and release of E. B. Nugent," Exhibit No. 2, is attached hereto and made a part hereof.

W. W. WATTS,
*Attorney for Mueller, Trustee.*
W. M. SMITH,
*Attorney for W. T. Nugent.*

48 United States District Court, District of Kentucky.

In the Matter of E. B. NUGENT, Bankrupt.

*Opinion.*

When this case was first brought to the attention of the court upon the report of the referee suggesting that the bankrupt be punished for contempt in not paying to the trustee the sum of $14,435.95, being moneys derived from the sale of the stock of goods to Straus, and other sources, the bankrupt's counsel explicitly stated to the court that their client was not of unsound mind, that being, of course, accepted as true. That being so, I was strongly inclined to think that the circumstances connected with the sale of the goods and the delivery of the proceeds to the son of the bankrupt were sufficiently suspicious to indicate a fraud which it was the duty of the court, in the interest of justice to the creditors, not only to investigate but to punish, and if possible correct. Later, however, and while it was hoped that the son might in some way be made to feel the necessity of relieving the father, the bankrupt's counsel suggested to the court in writing, in substance, that their client was not then of sound mind, and the court, wholly unwilling to punish any one in that unfortunate condition, or where there were reasonable grounds to believe that he was in such a condition, set the case for hearing on that question alone. The medical testimony then produced left no doubt upon the mind of the court that the condition of the bankrupt was such that if he were not actually insane, his mind was at least then so far weakened as to prevent him from being a fit subject for such punishment as the referee recommended. Still it was deemed best, inasmuch as no harm could come from it to any one, to let the matter rest until further inquiry could be made for the son.

49 There having been no success in that direction, the court will now dispose of the case, and for the reasons indicated the recommendation of the referee is not adopted.

The bankrupt is discharged from further attendance about this matter, but the trustee has leave again to bring the subject to the attention of the referee should developments or change of conditions make it, in his judgment, proper.

June 23, 1900.

A true copy—from the minutes of the court—witness my hand and seal of said court this 5th day of December, 1900.

THOMAS SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

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50 United States Circuit Court of Appeals for the Sixth Judicial Circuit.

W. T. NUGENT's Petition for Review in Wayne Knitting Mills, Belding Bros. & Company, and The German Insurance Bank, Plaintiffs,
*vs.*
E. B. NUGENT, Bankrupt, Defendant. } Stipulation.

For the purpose of saving time and expense in copying the evidence taken in the above case, and which is not included in the record here, the following stipulation is made, and is to be filed as part of the record in this court. It is agreed that there was no evidence whatever heard, taken or filed in this case, either before the referee or court, tending to show what disposition, if any, W. T. Nugent had ever made, at any time, of the money which the referee finds he received as the agent of his father, E. B. Nugent, after he received the same—except that he had not accounted to the trustee therefor.

But in signing this stipulation attorney for the trustee especially reserves the right to insist, and does hereby insist, that as to facts the findings below on a review under the act are conclusive.

W. M. SMITH,
*Attorney for W. T. Nugent.*
W. W. WATTS,
*Attorney for Trustee and Creditors.*

51 And afterwards, to wit, on the 11th day of December, A. D. 1900, the following motion for bail was filed:

United States Circuit Court of Appeals for the Sixth Judicial Circuit.

In the Matter of the Petition of W. T. NUGENT to Review an Order of the District Court of the United States at Louisville in the Case of The Wayne Knitting Mills, Belding Brothers & Company, and The German Insurance Bank
*vs.*
E. B. NUGENT, Bankrupt. } Motion for Bail.

W. T. Nugent, by his attorney, W. M. Smith, hereby files this motion and notice thereof, service of which is duly acknowledged thereon by the attorneys for the trustee and creditors of E. B. Nugent, bankrupt, and hereby moves the court to grant said W. T. Nugent bail herein pending the petition for review in the above-styled action in the circuit court of appeals for the sixth circuit, and that such orders be entered as will authorize and direct the taking of bond conditioned for the personal — of said W. T. Nugent to answer any judgment entered or order made upon the hearing and determination of said matter.

W. T. NUGENT,
By W. M. SMITH, *Attorney.*

52 And afterwards, to wit, on the same day, the following notice was filed:

United States Circuit Court of Appeals for the Sixth Judicial Circuit.

In the Matter of the Petition of W. T. NUGENT to Review an Order of the District Court of the United States at Louisville in the Case of The Wayne Knitting Mills, Belding Brothers & Company, and The German Insurance Bank
*vs.*
E. B. NUGENT, Bankrupt. } Notice.

Arthur E. Mueller, trustee in bankruptcy for the estate of E. B. Nugent, and W. W. Watts, attorney for said trustee and the creditors of said estate, *is* hereby notified that W. T. Nugent did, on the 10th day of November, file in the clerk's office of the United States circuit court of appeals for the sixth judicial circuit at Cincinnati, Ohio, the petition for review and revision in matters of law of the orders, judgments, findings and sentence of the district court of the United States for the district of Kentucky, the judgment and sentence having been made and rendered on the 3d day of November, 1900, and you are hereby notified that on December 11, 1900, in the United States circuit court of appeals sitting at Cincinnati, Ohio, I will enter motion and move the court to grant W. T. Nugent permission to execute bond herein for his personal appearance and be released pending the review herein.

W. M. SMITH,
*Attorney for W. T. Nugent.*

I accept service of this notice December 11, 1900.

W. W. WATTS,
*Attorney for Trustee and Creditors.*

53 And afterwards, to wit, on the 11th day of December, A. D. 1900, the following entry was made on the journal of the court:

In the Matter of the Petition of W. T. NUGENT for Review. No. 920.

This cause is argued on behalf of the petitioner by Mr. W. M. Smith; and on behalf of the trustee by Mr. W. W. Watts, and the further hearing continued until tomorrow.

And afterwards, to wit, on the 12th day of December, A. D. 1900, the following entry was made on the journal of the court:

In the Matter of W. T. NUGENT on Petition for Review. No. 920.

Lurton, Day, & Severens, JJ.

This cause is further argued for petitioner by Mr. W. M. Smith, and for the trustee by Mr. W. W. Watts, and is submitted.

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And afterwards, to wit, on the 13th day of December, A. D. 1900, the following order was made:

In the Matter of the Petition of W. B. NUGENT for Review of an Order of the District Court for the District of Kentucky. No. 920.

Petition to review an order of the district court of the United States for the district of Kentucky.

This cause came on to be heard on the said petition and was argued by counsel. On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said district court in this cause be and the same is hereby reversed with costs with directions to said district court to vacate the order of the referee upon the respondent to show cause, and his order adjudging the respondent to be in contempt thereof, vacated and set aside, and that the respondent be discharged from his imprisonment under the commitment aforesaid. It is further ordered that this order be certified forthwith to said district court.

54 And afterwards, to wit, on the 13th day of December, A. D. 1900, the following opinion was filed:

United States Circuit Court of Appeals, Sixth Circuit.

In the Matter of the Petition of W. T. NUGENT to Review an Order of the District Court of the United States at Louisville in the Case of The Wayne Knitting Mills, Belding Brothers & Co., and The German Insurance Bank vs. E. B. NUGENT. } No. 920.

On review from the United States district court for the district of Kentucky. In bankruptcy.

Before Lurton, Day, and Severens, circuit judges.

*Per Curiam:*

Upon the application of the trustee in this matter, the referee made an order enjoining the respondent from disposing of $14,233.15 alleged to have been received by him as the agent of the bankrupt before the filing of the petition for adjudication, and to have been money belonging to the estate; and further ordered him to show cause why he should not pay over such moneys to the trustee. In response to this last order, the respondent filed a plea to the jurisdiction of the referee, averring that he had not received such moneys or any part thereof since the petition in bankruptcy was filed. The referee held this response was insufficient, and no further response being made, he ordered the respondent to pay the said sum of money to the trustee before a date named. After that date, the money not having been paid, the referee adjudged the respondent

to be in contempt and recommended that he be committed to prison until he should make such payment. On the same day the respondent filed a petition for the review by the district judge of the proceedings on the order to show cause. The referee reported
55 the proceedings, and the district judge filed an opinion holding that they were authorized and proper, and directing an order for the commitment of the respondent as recommended by the referee.

Before any order had been entered in pursuance of the opinion, the respondent tendered a further answer in which he averred among other things that none of the moneys received by him as claimed by the trustee or at any time thereafter was received or held by him as agent or bailee of the bankrupt or in any trust capacity whatever, and that such moneys as he did receive were held adversely to the bankrupt. The judge being of opinion that the tender of this answer was too late, rejected it and ordered the commitment to issue. The respondent was accordingly committed and has remained in prison since. Upon the last-mentioned order being made the respondent filed his petition for review by this court and the proceedings have been certified and filed here.

So far as the original order of the referee relating to the issuance of an injunction is concerned we are not asked to review it and we therefore express no opinion upon that subject.

With regard to the matter certified to us upon the petition for review we are of opinion that the referee was without authority to entertain the trustee's petition and make the order to show cause. The respondent was not a party to the bankruptcy proceeding. The question whether the respondent had received the moneys mentioned was an open one. The petition states that the trustee does not know whether the respondent has the moneys in his hands or under his control, but is fearful that unless he is ordered to pay the moneys into the hands of the trustee they will be dissipated and lost. The further question whether if the respondent had the moneys under his control they were a part of the bankrupt's estate which the respondent was bound to pay over to the trustee was also open. It was necessary to determine both those questions before the respondent could be compelled to pay over any moneys to the trustee. The respondent being charged as having them in possession, they could not be recovered except through legal proceedings and such as afforded an opportunity for hearing and defense.
56 The summary proceeding before the referee was not such an one as the law requires, and, moreover, under the ruling in the case of Bardes *vs.* First National Bank, 178 U. S., 524, the respondent was entitled to have the question determined in a suit brought in the State court, both parties being citizens of Kentucky.

The result is that the order of the district court for the commitment of the respondent must be reversed; and the order to show cause made by the referee upon the respondent, and the further order of the referee adjudging that respondent be required to pay to the trustee the moneys alleged to be under his control, as well as

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the order of the referee adjudging the respondent to be in contempt thereof, should be vacated and set aside, and the respondent be discharged from his imprisonment under the commitment aforesaid.

The grounds of the present conclusion of the court will be more fully stated in an opinion hereafter to be filed.

And afterwards, on the 17th day of January, A. D. 1901, the further opinion was filed as follows, to wit:

United States Circuit Court of Appeals, Sixth Circuit.

*In re* E. B. NUGENT, a Bankrupt; ARTHUR MUELLER, Trustee, *v.* WILLIAM T. NUGENT. } No. 920.

On petition for review from the district court of the United States for the district of Kentucky.

Submitted December 12, 1900; decided January 8, 1901.

Before Lurton, Day, and Severens, circuit judges.

SEVERENS, circuit judge, delivered the opinion of the court:

On the 23rd day of March, 1900, E. B. Nugent was adjudicated a bankrupt upon the petition of the Wayne Knitting
57 Mills and others, his creditors, filed February 19, 1900, and the matter was referred to a referee. Shortly thereafter Arthur E. Mueller was appointed trustee of the bankrupt's estate. On the 7th of April following the trustee obtained an order upon the bankrupt from the referee, requiring him to show cause why he should not be required to pay over to the trustee two sums: one of $1,133.45, which it was alleged the bankrupt had received upon a mortgage of his house and lot in Louisville, and another of $10,100, alleged to have been received by him upon the sale of a stock of goods with which he had been doing business in that city. In the bankrupt's response he stated that the moneys were in the hands of his son, W. T. Nugent, and that it was impossible for him, the bankrupt, to pay the money to the trustee. Upon the hearing this response was held by the referee to be insufficient, and the bankrupt was ordered to pay the funds mentioned into the hands of the trustee. Upon the bankrupt's failure to do this, he was adjudged guilty of contempt by the referee, and the matter was reported to the court with a recommendation that the bankrupt be committed for his contempt. Upon a suggestion that the bankrupt was of unsound mind and approaching senile imbecility, the court declined to make the order and discharged him.

On the 13th day of April, 1900, the trustee presented to the referee a petition for an order to show cause against William T. Nugent, the present petitioner for review. In that petition the trustee alleged that the bankrupt pretended that the proceeds of the mortgage and stock of goods were in the possession of William T. Nugent, who had

been ordered to appear and testify; that the latter concealed himself and could not be found by the marshal. It was further stated that it was "shown by the evidence herein" that the said William T. Nugent was authorized by the bankrupt to receive the said moneys, and that the bankrupt pretended that the money was intended to be used in the payment of creditors and starting another business elsewhere. The trustee further stated in his said petition that he did not know whether the money was in the hands or under the control of E. B. Nugent, or William T. Nugent, but he was fearful it would be dissipated unless an injunction should be issued against
58 William T. Nugent, restraining him from disposing of any part thereof, and an order made that he pay the said moneys into the hands of the trustee; that as the trustee believed the said moneys were part of the estate of the bankrupt, and that if they came into the hands of said William T. Nugent at all, they did not come to him "as a common or simple debtor," "but that said sum is a fund belonging to this estate, and should be in the hands" of the trustee. Whereupon, the trustee prayed that an order for an injunction restraining William T. Nugent "from disposing of said moneys may be made, and further ordering him to pay all thereof, or such as he may have in his hands, to the trustee." Thereupon, without notice to the respondent, the referee forthwith made an order for the injunction as prayed, and further commanding him within five days after service of the order, to show cause why he should not be required to pay said sum of money to the trustee. Neither the petition or the order stated when the moneys came to the hands of the respondent, or under what circumstances. A copy of the order was served upon the respondent on October 8th, and on the 13th a hearing was had thereon before the referee. Shortly before that date an indictment had been found by the grand jury in the U. S. district court for the district of Kentucky against William T. Nugent, charging him with having unlawfully and fraudulently received $10,000 and other moneys of the bankrupt with the intent to defeat the provisions of the bankrupt act. On the above-mentioned hearing before the referee on October 13th, the said William T. Nugent filed a response in which he alleged that he had at no time since the filing of the petition in bankruptcy received the moneys with which he was charged or any part thereof, and excused himself from further answering by reason of the above-mentioned pending indictment, and the tendency of his answer to criminate himself. He further, in his said response, denied the jurisdiction of the referee to make the order on which the referee was proceeding. The referee proceeded to take testimony upon the matter of the order, and on a subsequent day to which the proceedings were adjourned, adjudged that the response to the order was insufficient, and that the said moneys were the proceeds of the mortgage of the house and
59 lot and of the sale of the stock of merchandise, and property of the bankrupt, and were received by the said William T. Nugent as the agent of the bankrupt, on February 19th, before the hour of 2 o'clock p. m., that the petition in bankruptcy was filed at 5 o'clock p. m. of the same day, and that as it further appeared that

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he had not paid over said moneys to the trustee the order should be made absolute. It was, thereupon, further ordered that the respondent pay the moneys to the trustee before 9:30 o'clock a. m. of the next day. The respondent having failed to comply with this order, the referee adjudged him in contempt and reported the matter to the court, with a recommendation that he be committed to prison until he should pay the moneys to the trustee. The respondent prayed for a review by the district judge of the order requiring him to pay the moneys to the trustee, and the referee certified the proceedings to the district judge. The matter came on for hearing before the judge upon the report and certificate of the referee, and on November 1, 1900, the judge announced an opinion that the proceedings of the referee should be sustained, and his recommendation of imprisonment approved. The matter was postponed until the 3d of November, when counsel for the respondent tendered an amended response which was verified by the respondent in which he stated in substance that he had failed to make response before the referee respecting moneys received by him before the petition in bankruptcy was filed because as he was advised his answer would tend to incriminate him of the charge contained in the above-mentioned indictment; but that he now asked to amend his response, and in addition to what he averred in his former response, he said "that whatever moneys came to his hands on February 19, 1900, belonging to said E. B. Nugent, or any such money at any subsequent date thereto, was not received or held by this respondent as agent or bailee or in any trust capacity whatever, but was held adversely to said E. B. Nugent." The judge declined to permit this amended response to be filed, being of opinion that it was too late. The following order was then entered:

"And, thereupon, pursuant to the opinion of the court filed
60 herein on the 1st instant, it is the judgment of the court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson county, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.45, or otherwise satisfy the said trustee with respect thereto, and the court reserves the right and power to suspend or set aside the judgment and sentence upon the delivery, payment or satisfaction aforesaid. To all of which the respondent, William T. Nugent, excepts."

In pursuance of this order the respondent was committed to the county jail.

Upon his petition the proceedings were certified to this court for review. The petition for review by the district judge prayed only for the review of the order of the referee, ordering the respondent to pay the sums of money mentioned to the trustee, and it is the action of the district judge upon that petition which is the subject of our review; but as the validity of the referee's order requiring the payment of the money, and the order finding the respondent guilty of contempt and the authority of the judge to order the imprisonment depend upon the previous proceedings, the whole of the proceedings must necessarily be considered.

It must be admitted that the circumstances shown by the record

would, unexplained, tend strongly to indicate that the petitioner was a party and perhaps the principal party to a fraud upon the creditors of the bankrupt. But if he was under no valid requirement to make defense and show such explanatory facts, if they exist, as would relieve the present appearances, and he has failed to do so in consequence of his reliance upon his objection that the proceedings were without lawful authority, it would be premature to pass judgment on the merits of the case.

The question of the legality of the proceedings is two-fold; first, whether it is competent for the court in bankruptcy to adopt this summary method of getting the assets of the bankrupt in, under circumstances such as these; and second, if such authority existed, whether it was duly exercised in the present case. It is needless to say that if the facts are as found by the referee the fund in question was of
61 the assets of the bankrupt, and that upon his qualification the trustee became vested with the title thereto as of the date of the adjudication of bankruptcy, and the right to its possession. But the question is, How may he recover such possession? If the circumstances are such that the bankrupt himself, but for his bankruptcy, could not recover the fund by a summary proceeding against one who withholds it from him, is there any provision in the bankrupt act which entitles the trustee to resort to it? The person in possession of the fund before the petition in bankruptcy was filed could not be dispossessed by violence or otherwise than by a plenary suit where his right to retain it could be tried and determined. Is his privilege taken away by the succession of the trustee to the bankrupt's right? It seems to be settled that the trustee stands in the place of the bankrupt for all purposes except that of asserting certain rights of creditors, in respect of which the bankrupt's hands are tied for their protection, but that exception has reference to rights of property and not to the remedies for their enforcement. We are not referred to any provision in the bankrupt act which accords the right to the trustee to resort to a summary proceeding against one who is not a party to the proceedings for the recovery of assets withheld from him by such other party who has the possession of them. In Bardes *vs.* Hawarden Bank, 178 U. S., 524, the Supreme Court indicated its opinion to be that Congress intended "that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and his creditors have been transferred to the trustee in bankruptcy." The district judge and the referee seem to have thought that if in the judgment of the court the possession was not adverse to the bankrupt, such proceedings might be adopted to dispossess the holder. But it is the exercise of jurisdiction to determine whether the circumstances are such that the possession is really in right of the bankrupt or adverse to him or to the trustee. It would be the pith of a controversy in a suit at law or in equity
62 brought to enforce the rights of the trustee. The view which was entertained in the district court seems to have been taken

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from the language of decisions which has denied the right of the bankruptcy court to take jurisdiction of causes between the trustee and outside parties claiming adversely to him where there was no jurisdiction independently of the bankrupt act, referring particularly to the recent case of Bardes *vs.* Hawarden Bank above cited. But such language was meant, as we understand from its context, to include all holdings as adverse when the circumstances are such that the property cannot be recovered without resort to legal remedies. For the reasons given for the decision would apparently include all such cases. In the case of a general assignment for the benefit of creditors, the assignment being void, the assignee's possession is without right and the title as well as the right to possession is in the assignee. But if the latter cannot recover the property otherwise than by legal proceedings, he must resort to the ordinary legal remedies. We perceive no valid distinction between such a case and any other where there is an adverse holding in fact by one not a party to the proceedings, no matter what the character of such possession may be in point of law.

Neither was the respondent subject to process from that court. The respondent, the bankrupt, and the trustee were all citizens of Kentucky.

If the bankrupt could not have instituted legal proceedings in the district court for the recovery of the money, it seems clear that the trustee could not. The jurisdiction is not changed by the transfer of the title from the bankrupt to the assignee. And it was declared in the Hawarden Bank case above referred to that under the second clause of section 23 of the bankrupt act controversies not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, do not come within the jurisdiction of the district courts of the United States, unless by consent of the proposed defendant.

But it is urged that the respondent was the agent of the bankrupt and that his possession was that of the bankrupt, and
63 that as the bankrupt could be compelled to turn over the fund so might his agent. This argument again confounds the actual with the theoretical conditions, and it is with the former that we are necessarily concerned.

Let it be conceded that in the eye of the law the possession of the agent is that of the principal; yet, if as matter of fact, the agent withholds the property of his principal, the latter must have recourse to the ordinary legal remedies and in a proper court. The fiduciary relation between them gives the principal no extraordinary remedy to compel the agent to deliver the property which he holds to his master. That relation may affect the determination of the court, when its jurisdiction has been properly invoked, but that is another matter.

The case with which we have to deal is one where the bankrupt transferred the assets before the petition in bankruptcy was filed and the trustee has never had possession, and where his right is given

by the retroactive operation of the law resulting from the adjudication in bankruptcy.

How the matter would stand where the assignee has obtained possession of the assets and a third person dispossesses him or otherwise meddles with the assets is a different question and is subject to different considerations into which we have here no necessity to go.

Our conclusion that these proceedings are invalid for lack of sufficient authority from the law also makes it unnecessary to consider whether, if such authority existed, the petition to the referee for the order to show cause was sufficient to found the proceedings against the respondent and whether the proceedings taken thereon were regular or otherwise.

It results that the order of the district court for the commitment of the respondent should be reversed and the order to show cause made by the referee, together with his order requiring the respondent to pay the trustee the money under his control, as well as the order adjudging the respondent to be in contempt, should be vacated and set aside.

64 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of record In the matter of the petition of W. T. Nugent to review an order in the case of Wayne Knitting Mills, *et al., vs.* E. B. Nugent, No. 920, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my [SEAL.] name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 23d day of March, A. D. 1901.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

65 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Being informed that there is now pending before you a suit entitled In the matter of the petition of W. T. Nugent to review an order of the district court of the United States at Louisville in the case of The Wayne Knitting Mills, Belding Brothers & Company, and The German Insurance Bank *vs.* E. B. Nugent, bankrupt, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of

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appeals and removed into the Supreme Court of the United
66 States, do hereby command you that you send, without delay, to the Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of March, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

UNITED STATES OF AMERICA, } ss:
*Sixth Judicial Circuit,* }

Pursuant to the command of the foregoing writ, I return the same, this 23rd day of March, 1901, by attaching thereto a certified copy of the record in this court in the matter of the petition of W. T. Nugent to review an order of the district court of the United States at Louisville in the case of The Wayne Knitting Mills, Belding Bros. & Co., and The German Insurance Bank *vs.* E. B. Nugent, bankrupt.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

67 [Endorsed:] File No., 18,061. Supreme Court of the United States. No. 576, October term, 1900. Arthur E. Mueller, trustee, &c., *vs.* William T. Nugent. Writ of certiorari.

Endorsed on cover: File No., 18,061. Sup. Court of the United States, October term, 1900. Term No., 257. Arthur W. Mueller, trustee, &c., petitioner, *vs.* William T. Nugent. Writ of certiorari & return. Office Supreme Court U. S. Filed Mar. 25, 1901. James H. McKenney, clerk.

23706

Supreme Court U.S.
FILED
FEB 25 1901
JAMES H. McKENNEY,
Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

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ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, . . . *Petitioner,*

*vs.*

WILLIAM T. NUGENT, . . . . . *Respondent.*

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*Motion, Petition for Writ of Certiorari, and Brief for the Petitioner, Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, Bankrupt, in Bankruptcy.*

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WILLIAM W. WATTS,
Counsel for Arthur E. Mueller, Trustee.

JOHN RICHARD WATTS,
Of Counsel.

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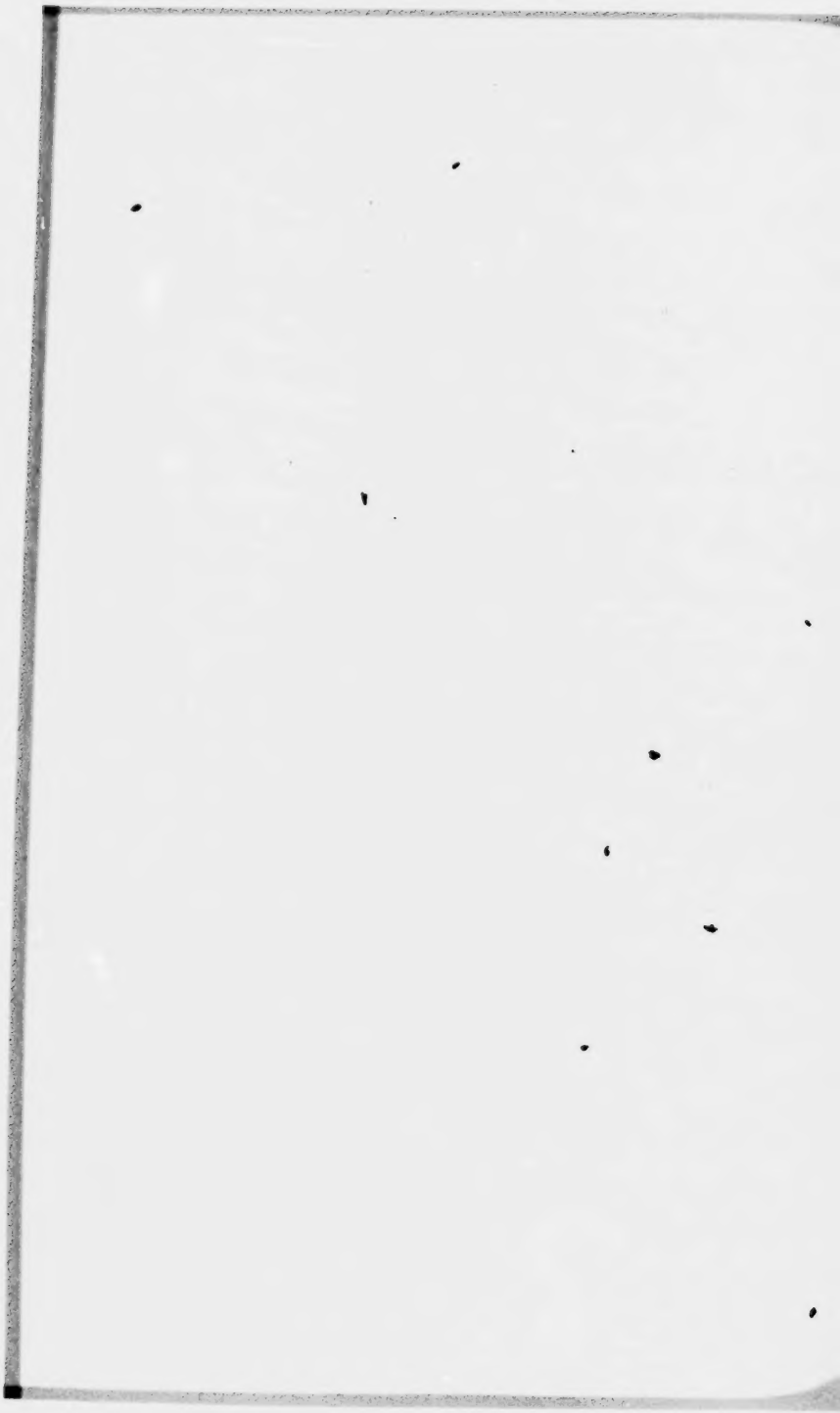
C. C. RUNKEMACHER PRESS, LOUISVILLE, KY.



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# In the Supreme Court of the United States.

**OCTOBER TERM, A. D. 1900.**

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ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT . . . *Petitioner*,

VS.

WILLIAM T. NUGENT . . . . . *Respondent.*

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MOTION.

Now comes Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, by William W. Watts and John Richard Watts, his counsel, and moves this Honorable Court that it shall, by a writ of *certiorari* directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein William T. Nugent was petitioner for review in the matter of Wayne Knitting Mills, Belding Bros. & Co. and the German Insurance Bank against Edward B. Nugent, bankrupt, in bankruptcy; and to that end now tenders his petition, together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

WILLIAM W. WATTS,
JOHN RICHARD WATTS,
*Counsel for Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, Bankrupt.*

Notice of date of motion is hereby waived; and notice of the foregoing motion is hereby accepted this 29th day of January, A. D. 1901.

WILLIAM T. NUGENT,
By W. M. SMITH,
*Counsel.*

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# In the Supreme Court of the United States.

**OCTOBER TERM, A. D. 1900.**

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ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT . . . *Petitioner*,

*vs.*

WILLIAM T. NUGENT . . . . . *Respondent.*

PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, REQUIRING IT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVISION AND DETERMINATION, THE PETITION FOR REVIEW IN BANKRUPTCY TAKEN BY SAID W. T. NUGENT AGAINST ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, IN THE MATTER OF WAYNE KNITTING MILLS, BELDING BROS. & CO. AND THE GERMAN INSURANCE BANK VS. EDWARD B. NUGENT, BANKRUPT, IN BANKRUPTCY, LATELY DEPENDING IN SAID COURT OF APPEALS.

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petition of Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, filed under the provisions of Section 25*d* of the Bankruptcy Act of 1898, respectfully represents as follows:

I.

This cause involves a question entirely novel and one of the most vital importance arising under the Act of 1898—a question more far-reaching in its importance than the one

decided by this Court in Bardes vs. Bank, 178 U. S., page 524. Upon its determination by this Court depends to a large extent the usefulness of said Act.

On February 19, 1900, about the hour of 2 o'clock p. m., being more than three hours before a petition, praying for the involuntary adjudication of Edward B. Nugent, bankrupt, was filed, the respondent, W. T. Nugent, son of the bankrupt, received from the bankrupt (Edward B. Nugent), as his agent and as custodian of the fund, money belonging to the bankrupt amounting to $14,233.95. It is nowhere claimed by the one side or relied upon by the other in this controversy that the delivery of said fund to the agent as custodian was a "transfer" or "fraudulent transfer" within the meaning of the case of Bardes vs. Bank, 178 U. S., 524.

After the adjudication, certain proceedings in contempt were had against Edward B. Nugent, the bankrupt, looking to the recovery of that fund, but because of the then condition of mind of said bankrupt he was discharged from further attendance about that matter. Upon the petition of the trustee, the referee, to whom the case had been referred, then issued a rule against said W. T. Nugent to show cause, five days after service thereof, why he should not be required to turn over said funds to the trustee. (R., p. 19.) After some months' delay, said W. T. Nugent, having been served with a copy of said order, appeared before the referee in person and by counsel, and without objecting to the time given for response, or that he was improperly or irregularly made a party, filed a response (R., p. 23) to the rule in which he objected only to the jurisdiction of the referee or the Court to issue said rule; and further responded that if he had received the said money, or any part thereof, it was before the petition in bankruptcy was filed. He also responded that by reason of the fact that he was indicted, charged with the offense of receiving said money and retaining the same and aiding and abetting in the retention thereof, after the

filing of the petition in bankruptcy, he could not make further response without incriminating himself. Without waiving, but reserving, the jurisdictional question, Nugent then agreed that certain depositions of his father the bankrupt, his sisters and others should be read on the hearing of the response. (R., p. 21.) Nugent offered no proof in his own behalf.

The referee, in order to first determine whether he had jurisdiction, then heard the proof offered by the trustee and found that said Nugent had received said money only as agent and custodian of his father, the bankrupt; that he had not accounted for the same, and that said money belonged at the time of the hearing of the rule to the bankrupt's estate. No additional response was then offered by Nugent. Whereupon the referee then exercised jurisdiction and made said rule absolute and ordered Nugent to pay over the money to the trustee in bankruptcy. (R., p. 21.) Upon his failure to comply with said order, and still without additional response, the referee found him guilty of contempt and certified the case to the Judge, with a recommendation that said W. T. Nugent be punished for contempt and committed until he should pay said sum. (R., p. 25.)

The respondent then filed with the referee his petition for review, in pursuance of General Order No. 27 of the Supreme Court (R., p. 26), and upon the certification by the referee to the Judge, showing the question presented, the summary of the evidence, and the findings and order thereon, according to said General Order 27, and form 56, a hearing was had before him. The referee also certified to the Judge the depositions read on the hearing of the case, and same were before the Judge.

The Judge, after the hearing, rendered an opinion (R., p. 28) in which the finding of the referee was sustained, and said W. T. Nugent, being in Court, he was called to the bar to receive sentence; whereupon, at the request of said W. T.

Nugent by his counsel, the Judge deferred passing sentence for two days. At the expiration of said two days said respondent, by his counsel, tendered an amended response (R., p. 37) in which for the first time he sought to answer, in general terms, and with conclusions of law only, that the funds in question were held and claimed by him adversely to the bankrupt or his estate. The Judge, on the theory that the hearing was in the nature of an appeal from the decision of the referee, refused to permit that response to be filed, holding that it manifestly came too late (R., p. 36); that such response should have been filed before the referee at the time of the hearing upon the rule. That amended response so offered was neither filed generally nor for the purposes of appeal or review. In his opinion filed, the Judge, in addition to sustaining the findings of fact by the referee above recited, also found from the proof before him the following facts in this language:

> "The Court finds the facts of the case to be as above stated, with the addition that the entire amount, $14,233.95, is the property of the bankrupt's estate alone; that it had been taken possession of, and was held by W. T. Nugent as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim or right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in anywise to have claimed it adversely to the bankrupt or the trustee." (R., pp. 30–31.)

In refusing to permit said amended response to be filed, the Court entered the following order:

> "Came William T. Nugent, respondent herein, and tendered an amended response and moved to file same,

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and the Court not having postponed the imposing of the sentence for that purpose, and being of the opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the Court, declines at this stage of the proceedings to permit a further response to be filed.

"And thereupon, pursuant to the opinion of the Court filed herein on the 1st instant, it is the judgment of the Court that Wllliam T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson County, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.95, or otherwise satisfy the said trustee with respect thereto; and the Court reserves the right and power to suspend or set aside this judgment and sentence upon the delivery, payment or satisfaction aforesaid.

"To all of which the respondent, William T. Nugent, excepts." (R., p. 36.)

Thereafter said W. T. Nugent, under Section 24*b* of the Act, filed a petition in the United States Circuit Court of Appeals for review, praying that the orders, judgment and sentence of the District Court be reviewed and revised in the matter of law, etc. (R., p. 1.)

After hearing said petition for review, said Circuit Court of Appeals, on the 13th day of December, 1900, entered a decree (R., p. 53) reversing and vacating the order of the District Court for the commitment of the respondent, and the order made by the referee upon the respondent to show cause, and the further order of the referee adjudging that said respondent be required to pay to the trustee the monies alleged to be under his control, as well as the order of the referee adjudging the respondent to be in contempt; and on the same day filed a memorandum opinion (R., p. 54) and issued its forthwith mandate (R., p. 53) in direct contravention of its Rules of Court No. 29 and 32, which are as follows:

29. "A petition for rehearing after judgment can be presented only within thirty days after the day when the

printed opinion of the Court is returned by the printer to the Clerk, and can be obtained by counsel for the parties (which date the Clerk shall note upon the appearance docket), unless by special leave granted during such thirty days, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted or permitted to be argued, unless a Judge who concurred in the judgment desires it and a majority of the Court so determine."

32. "In all cases finally determined in this Court a mandate or other proper process in the nature of a *procedendo* shall be issued, on the order of this Court, to the Court below, for the purpose of informing such Court of the proceedings in this Court, so that further proceedings may be had in such Court as to law and justice may appertain.

"Such mandate shall not issue until time has elapsed for filing a petition to rehear, as defined by rule 29; and no mandate or other process or *procedendo* shall issue when a petition to rehear is pending, unless specially ordered.

"Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case."

By that action W. T. Nugent was immediately released from custody, and that before this petitioner could apply for a rehearing in that Court or *certiorari* here.

On the 17th day of January, 1901, said Circuit Court of Appeals filed a printed opinion in the cause. (R., p. 56.)

II.

With the petition for review said W. T. Nugent filed various exhibits containing matters not part of the record in the Court below, one of which was a copy of said amended response (R., p. 37), which was not a part of the record or

before the referee or Judge below, as shown herein above. And said petition for review further contained allegations of fact not in or shown by the record, and not before the District Court or the referee.

Among other things said petition for review contained the following allegations, to-wit:

> "He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use, he being a creditor of said Nugent, and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy or the appointment of said trustee or the adjudication therein, and that there was no evidence to the contrary, or that he had any of said money on hand or under his control when he was served herein as stated." (R., p. 6, beginning on 25th line.)

As stated, that allegation was never before the referee or the Judge of the District Court, nor was it acted upon by them, but was wholly original matter, and not properly a part of the record. All the irrelevant and impertinent matter the trustee moved the Circuit Court of Appeals to expunge from the record, which motion said Court of Appeals failed to sustain or act upon; though it is contended, as appears from the opinion of that Court, many of those impertinent matters, and particularly said so-called amended response, were relied upon.

III.

The Supreme Court, in Bardes vs. Bank, 178 U. S., 524, has decided that, except with the consent of the proposed defendant, the District Court has no jurisdiction to entertain an independent suit brought by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt to a third party, in possession of and *claiming the property* "*as*

*his own*," and which transfer is *alleged to have been fraudulent as against creditors.* Except as to suing a debtor, that is all that said case does decide.

But, upon authority of that decision, the Circuit Court of Appeals has held that the District Court, which included the referee, has no jurisdiction, by summary process or rule, to compel a mere custodian of the property of a bankrupt to deliver the same to a trustee in bankruptcy when the elements of a fraudulent transfer did not exist, nor were alleged; and that, too, even though it be conceded that the legal title of said property was in the bankrupt and is vested by the Bankrupt Act in the trustee; and, too, when the custodian is asserting no adverse title to the property; and, further, the Court of Appeals has decided that where a party makes a general assignment for the benefit of creditors, and by reason thereof is adjudged a bankrupt, the trustee in bankruptcy can not recover the property of the bankrupt from the assignee by summary process, notwithstanding the deed of assignment is made void by the adjudication in bankruptcy; but he must resort to an independent action unless there be jurisdiction upon other grounds than those arising under the bankruptcy law.

And the Court of Appeals has in effect held that the referee may not by summary procedure inquire into the nature of the custodian's holding, to ascertain if it be adverse or not; and it has further held that, though the custodian fails to assert any adverse claim, and the proof shows his holding to be amicable, the referee is nevertheless without jurisdiction to compel him to surrender the property to the trustee. These rulings it is contended are not warranted by Bardes vs Bank, *supra.*

It is to review the rulings of the Circuit Court of Appeals on these questions that this petition for a writ of *certiorari* is applied for. The questions are of paramount importance, because, unless that decision of the Court of Appeals is re-

versed or materially modified, the power of the bankruptcy court under Section 2 (6), (7) and (13) of the Act to bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy, to cause the estate of bankrupts to be collected, reduced to money and distributed, to determine controversies in relation thereto, and to enforce obedience by bankrupts and other persons, will be almost, if not entirely, rendered nugatory.

The question in this case is not as it was in Bardes' case, whether the District Court has jurisdiction to entertain a plenary and independent suit, brought by a trustee in bankruptcy against a citizen of the same State to recover assets, the title to which is in dispute; but the question involved is this: Can the District Court by rule compel an agent or custodian for the bankrupt or for the Court, who has the mere naked possession of the bankrupt's estate, claiming no interest therein, and asserting no title thereto, to deliver such property to the trustee? Or must the trustee be compelled to resort to an ordinary action and the expense and delays incident thereto in another court to obtain possession of such property from such a custodian? Or does not the bankruptcy law provide means for the speedy and economical administration of the estate, and does not Section 2 with its sub-sections exactly cover just such cases as this?

Your petitioner, with all due respect, maintains that the case of Bardes vs. Bank, *supra*, is not susceptible of the constructions placed upon it by the Court of Appeals, and was evidently not so intended by this Court; and therefore under that authority, the Court of Appeals erred when it held, as it did in effect, that under no circumstances can the possession of property be recovered, except by an independent, plenary, dilatory and expensive suit in some other court.

Your petitioner contends that, on the contrary, the District Court has jurisdiction by summary process to require the

custodian of property belonging to the bankrupt's estate, to deliver the same to the trustee, unless said custodian is holding the property adversely or claiming, in good faith, title, or at least colorable title, to said property; that the custodian is the agent or trustee of the court holding such property, and can by a rule be compelled to deliver it over to the trustee; that the mere naked possession of property without claim of title or color of title, is not sufficient to put the case at bar within the principles of the Bardes case. In fact, this Court, in stating the question decided in the Bardes case, laid stress upon the point that the third party, from whom it was sought to recover the property, was holding it adversely; and that adverse holding was the foundation upon which this Court based that opinion.

After diligent search petitioner has been unable to find any definition of "adverse possession" which does not contemplate the holding by some claim or color of title.

The petition for review filed in the Court of Appeals gave that Court only the power to review matters of law. (*In re* Purvine, 5th Circuit Court of Appeals, 96 Fed., 192.) And the Circuit Court of Appeals in this circuit has so declared in Cunningham vs. German Insurance Bank, 103 Fed., 932, and has further decided that only such matters as were acted upon by the Court below could be reviewed.

So that upon the record, disregarding the impertinent matter as it reached the District Court and Circuit Court of Appeals, it was conclusively established, as matter of fact, that W. T. Nugent received said funds only as the agent or custodian of the bankrupt; that at no time until after the rendition of the opinion by the District Judge was he asserting any claim or right to or ownership in said fund; consequently the cold question of law was before the Court of Appeals as to whether or not the referee or the District Court had power by rule to compel such a custodian, claiming no title in the property, to deliver it to the trustee.

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IV.

This Court, in the case of White vs. Schloerb, 178 U. S., 542, decided that a judge of the bankruptcy court may compel a sheriff to return goods to the judicial custody of his court, seized and taken therefrom by a sheriff in replevin proceedings.

The petitioner contends that in the case at bar, the agent's custody, being amicable and without adverse claim, placed the agent in the attitude of the sheriff in the White vs. Schloerb case; and there being no adverse claim at the time of the adjudication, trial and decision by the referee and Judge, the property could not be lifted from the judicial custody by any adverse claim thereafter made.

Nugent's taking or holding the money as custodian was continuous from the moment he received it until he was ordered to pay it over; and it was at all times a holding for the benefit of the bankrupt, and hence for the Court and its officer, the trustee. There never was a break in that continuity.

In the case of *in re* Rosser, 101 Fed., 562, the Eighth Circuit Court of Appeals has held that upon adjudication all the property of the bankrupt is placed in *custodia legis*, and that the bankrupt and every other party who has the possession or control of any part of it, holds that part as agent and trustee of the court and its officer.

The Circuit Court of Appeals for the Ninth Circuit, *in re* Francis-Valentine Co., 94 Fed., 793, has decided that the Court may summarily require a sheriff to deliver to the trustee the possession of a bankrupt's property seized within four months prior to the proceedings in bankruptcy; and in that case the Court, commenting on Marshall vs. Knox, 16 Wall., 551, used this language:

"In that case a lessor of the bankrupt had caused the sheriff, under a writ of provisional seizure, to take possession of certain property of the bankrupt, which the lessor claimed the right to hold as a pledge for the payment of rent which was due him. It was held that the District Court sitting in bankruptcy has no jurisdiction to proceed by rule to take the goods from the possession of the sheriff. The Court, referring to the seizure of the goods, said: 'The landlord claimed the right thus to hold possession of them until his rent was satisfied. This claim was adverse to that of the assignee.' These words quoted from the opinion fully explain the ground of the decision. It was because the claim was adverse to that of the assignee. In the present case the sheriff had possession, not in opposition to the right of the bankrupt nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt."

The Court will observe that the analogy between the Valentine case and the case at bar is complete, for it is established by facts binding upon the Court of Appeals that W. T. Nugent received this money as custodian only; that the capacity of custodian was never changed, and that he was asserting no adverse claim or title thereto; but, in the words of the Court of Appeals for the Ninth Circuit, Nugent "had possession, not in opposition to the right of the bankrupt, nor in opposition to his title, but his possession was based entirely upon the assumption that the title was in the bankrupt." The District Courts in Vermont, New York and West Virginia, which decisions are the law in those districts respectively, have also sustained the right to issue such rules. (*In re* Brooks, 91 Fed., 518; *in re* Raymond W. Kenney, 95 Fed., 427; *in re* Moore, 104 Fed., 869.) Then, too, it is contended the opinion of the Court of Appeals is in conflict with White vs. Schloerb, 178 U. S., 542.

*In re* Ward, 104 Fed., 985, it was sought to obtain an injunction against one O'Donald from disposing of certain

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"funds and credits due" to the bankrupt and which were in the possession of the said O'Donald. Judge Lowell, of the Massachusetts District, basing his opinion upon the case of Bardes vs. Bank, refused to grant the injunction, and commenting on the cases of Bardes vs. Bank and White vs. Schloerb, closes his opinion with the following language:

> "It is greatly to be desired that a further exposition of the jurisdiction of the District Court in bankruptcy should be made as speedily as possible by the Supreme Court, and if counsel for the petitioners shall desire to take this case directly to the Supreme Court, as is provided by Section 5 of the Judiciary Act of 1891, 26 Stat., 827, I will gladly facilitate proceedings to that end."

And so it is that your petitioner contends that by reason of the decision in the case at bar, and the others so cited, there is a contrariety of opinion, and not a uniform administration of the Bankruptcy Act (as necessary as uniformity in the Act itself, required by Sec. 8, Sub-sec. 4, Art. 1 of the Constitution of the United States) as to the grave and important question, to-wit: The right of the court of bankruptcy to summarily order in property which is admittedly assets of a bankrupt's estate and which the holder thereof is not claiming as his own.

Your petitioner appends hereto his brief in support of this petition.

WHEREFORE, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in the case therein, entitled "The Wayne Knitting Mills, Belding Brothers & Company and the German Insurance Bank, against E. B. Nugent, bankrupt, on petition of W. T. Nugent

for review, No. 920," to the end that said case may be reviewed and determined by this Court, as provided by law; and that the judgment of the said Circuit Court of Appeals in said case may be modified so as to deny the petition for review filed by said W. T. Nugent to that Court in bankruptcy.

And your petitioner will ever pray.

WILLIAM W. WATTS,
JOHN RICHARD WATTS,
*Counsel for Petitioner.*

STATE OF KENTUCKY, }
JEFFERSON COUNTY. } SCT.

William W. Watts, being duly sworn, says that he is one of the counsel for Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, the petitioner named; that he has read the foregoing petition, and the facts therein stated are true, as he believes.

WILLIAM W. WATTS.

Subscribed and sworn to before me this 29th day of January, A. D. 1901. My commission as Notary Public expires on the 12th day of January, A. D. 1904.

[SEAL]

E. B. KERR,
*Notary Public within and for County of Jefferson, State of Kentucky.*

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# Supreme Court of the United States.

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT . . . *Petitioner*,

vs.

WILLIAM T. NUGENT . . . . . *Respondent.*

**Brief for the Petitioner, Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, Bankrupt, in Bankruptcy.**

The gravity of the situation in which the bankruptcy law will be placed, if this case shall be affirmed, will indeed be very great.

The Circuit Court of Appeals for the Sixth Circuit, in the case at bar, has, in effect, announced that, however one is holding assets of a bankrupt's estate, coming to his hands before the proceedings in bankruptcy were begun, he must, if he does not voluntarily surrender them, if recovery be desired, be sued in an independent action, which means dilatory processes in another court.

As expressly decided, an agent or custodian of such property, without claim of ownership or adverse title thereto, must, if he does not surrender, be sued in a plenary suit, and is not subject to rule. An assignee under a deed of assignment for the benefit of creditors, it is expressly stated, must be sued in an independent action even though the deed be an act of bankruptcy and made void by the adjudication.

While all our criticism of the opinion is profoundly respectful, yet we believe this case is not within the principles

of the Bardes case. The opinion will result in and engender evil influences, multiplying opportunities to commit frauds upon the Bankruptcy Act and creditors. In order to obtain from the Act the highest degree of usefulness there is need for the very broadest construction, justified by the law, to be placed on the provisions thereof, ignoring rights of neither creditors or bankrupts.

The facts of the case are fully set forth in the petition for the writ, which is filed under Section 25*d* of the Act of 1898.

The pendency of an indictment as relied upon by him in his response (R., p. 23) did not excuse W. T. Nugent from disclosing the facts. That matter is soon disposed of.

> "A court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws, nor invading the constitutional right of trial by jury.
>
> . . . . . .
>
> "The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution.
>
> . . . . . .
>
> "And it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction." *In re* Eugene Debs, etc., 158 U. S., 564.

That authority was relied upon, and the above excerpts quoted, in the case of Ripon Knitting Works vs. Schreiber, 101 Fed., 810, decided under the Act of 1898.

Therefore the case presents but two main questions:

First: The failure of the Circuit Court of Appeals to sustain petitioner's motions to expunge as impertinent, from the record before it, matter not before the referee or Judge below, nor acted upon by either, and yet which matter, we infer, was relied upon by said Court of Appeals in reaching its conclusion.

Second: Do the principles of the Bardes case, or those of

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White vs. Schloerb, both decided by this Court, apply to the one at bar? Did the agency of the respondent, without adverse claim or color of title to the fund, take it out of the Bardes case, leaving White vs. Schloerb to cover it, and thus leave to the District Court its jurisdiction to summarily order in the assets in *custodia legis?*

## THE MOTIONS TO EXPUNGE.

We are complaining that the Circuit Court of Appeals did not sustain the motions made by us to expunge certain impertinent matter contained in and filed with the petition for review, and which though not a part of the record below, must have been relied upon by the Court of Appeals.

The motion will be found on page 10 of the printed record, and the most important item of all the impertinent matter is what is called Exhibit No. 11: "Amended response and copy of indictment." (R., p. 37-38.)

Our objections to a reading of that response are these:

First: It was never filed. It was never a part of the record, nor was it acted on by the referee or District Judge. It was not even made a part of the record for the purpose of appeal or review, as is the practice in equity when the motion to file is refused.

Second: The Court of Appeals could only consider it as an original pleading filed with it. This it has decided it can not do; that it can only revise those matters of law fairly presented to and acted on by the Judge of the District Court.

Cunningham vs. German Insurance Bank, 103 Fed., 932.

Courier-Journal J. P. Co. vs. Schaefer-Meyer Brewing Co., 101 Fed., 699.

Third: This Court meant something in its construction of the Act in its General Order 12 where, after providing for

a reference to the referee, it is said: "And thereafter all the proceedings, except such as are required by the Act or by these General Orders to be had before the judge, shall be had before the referee."

It meant something by the provisions of General Order 27, where, on review to the judge, it is provided that the referee shall certify the question presented, a summary of the evidence and his findings and order thereon.

It meant something by promulgating form 56 covering that certificate.

And though the Act in Section 1 provides that "court" may include the referee, the words of this Court, in the case of White vs. Schloerb, 178 U. S., 542, are even more significant, to-wit:

> "Under Sec. 33–43 of the Bankrupt Act of 1898, and the Twelfth General Order in Bankruptcy, referees in bankruptcy are appointed by the courts of bankruptcy, and take the same oath of office as judges of the United States Courts. Each case in bankruptcy is referred by the Court of Bankruptcy to a referee and he exercises much of the judicial authority of that Court."

The referee under the present Act decides contested matters before him. Under the Act of '67 the register could not do so.

If, then, upon a reference the referee is the Court, and if he exercises judicial functions, a review to the Judge is in the nature of an appeal; it is the referee's action that is reviewed; the review is heard on the record sent up by the referee, and that record must be made up before the referee, and is the record throughout the case.

The amended response was never even offered to be filed before the referee, and it was no more proper to offer it before the District Judge than before the Circuit Court of Appeals or before this Honorable Court.

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Fourth: Still insisting that the Judge could not receive the paper on review, it was at least within his judicial discretion to refuse to receive it when the case had been heard and determined by him.

The exercise of such discretion, at the stage of the case when the amendment was offered, will not be disturbed on appeal.

Neale vs. Neale, 9 Wall., 1.

Fifth: Since the salient feature of that paper (R., p. 38) is this: "He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent, or any such money at any subsequent date thereafter, was not received or held by this respondent as agent or bailee or in any trust capacity whatever, but was held adversely to said E. B. Nugent," we contend that it was but a sham, a subterfuge, built to avoid the effect of the decision of the Court rendered two days before; and that even if the filing of an amended response was before the Judge, and at that stage of the proceedings, allowable, such a conclusion of law as was alleged, all the circumstances of the case considered, would not be accepted. Facts on which to base intelligent action should be stated.

> "A plea that at the time of the bringing of this suit and long prior thereto this defendant was and still is in the open, notorious, continuous and exclusive possession of the said premises, as the sole owner thereof, and claiming and holding adversely to the complainants and the whole world, is bad in that it consists of conclusions of law."
>
> McCloskey vs. Barr, 38 Fed., 165.

On the motion, out of time, to file a pleading against objection, the Court may look to the sufficiency of the pleading, in its determination of the motion to file.

Sixth: After the failure to amend the response before the

referee, it was proper for the Judge to refuse to allow the amendment to be filed, when Nugent had stood by his response, waited till after the hearing on review, and, after the case was decided by the Judge, then offered, with conclusions of law only, a demurrable amendment, which in general terms tried to avoid the effect of the opinion of the Judge, rendered two days before, in deciding the case.

It is not proper practice that a party shall wait to see what the Court will decide, on review or otherwise, before he puts in his defense.

What is said above applies as well to that paragraph in Nugent's petition for review to the Circuit Court of Appeals, quoted in the motion to expunge (R., p. 11), as follows:

> "He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use, he being a creditor of said E. B. Nugent, and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy or the appointment of said trustee or the adjudication therein, and that there was no evidence to the contrary, or that he had any of said money on hand or under his control when he was served herein as stated."

That matter is entirely new, appearing for the first time in the record in the Court of Appeals. It does not appear in the original response (R., p. 23) or the so-called amended response (R., p. 38.) It was not before either the referee or the Judge, nor was it acted upon by them, and is in direct conflict with their findings of fact.

The Court of Appeals is not a court of original jurisdiction, and issues are not to be joined there, or proof taken there on such issues.

Eliminating, then, these two objectionable features, the impertinent matter, and matter not before or acted upon by either Judge or referee, there is not in the case a scintilla of

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claim to either title or adverse possession. And will this Court allow such practice, such padding of the record on review, with matter *dehors* the record, put there to defeat the ends of justice and the provisions of the Act of Congress as to bankruptcy? We can not conceive it.

## DOES THE BARDES CASE, OR WHITE VS. SCHLOERB, APPLY?

Both cases were decided on the 28th day of May, 1900, and are reported in 178 U. S., pp. 524 and 542 respectively. The one deals with him who holds assets of the estate in adverse possession coming to his hands before the bankruptcy proceedings. The other deals with him who seizes the assets after the bankruptcy proceedings had begun and when the property had come in *custodia legis*. This Nugent case is intermediary, and deals with one coming in possession three hours before the institution of bankruptcy proceedings, yet who holds the assets as agent only without adverse claim. Which of the cases decided by this Court applies—Bardes vs. Bank or White vs. Schloerb? Or does it devolve on this Court now to formulate other principles applying to and covering the case at bar?

The proposition raises the question whether a court of bankruptcy has power to gather in the assets of the bankrupt under Section 2 (6, 7, 13) of the Act of 1898 by summary process or rule, against one who may have the mere naked possession of the property as an agent or custodian of the bankrupt. No question of fact is involved, for the finding of fact by the referee, as a first court in bankruptcy, as reviewed by the Judge, is conclusive; and the bare question of law as to the method of obtaining possession of the bankrupt's estate is alone to be considered. The referee and District Judge decided that W. T. Nugent, a few hours before the petition

in involuntary bankruptcy was filed, came into possession as agent and custodian for the bankrupt of funds belonging to the bankrupt's estate · that up to and until after the hearing before the District Judge he still held possession of the said assets, making no claim or title thereto; and further decided that under such circumstances an independent suit need not be brought by the trustee; but that he could proceed by rule before the referee.

Upon a petition for review the Court of Appeals reversed this ruling and in fact decided that the remedy by rule was not allowable under the law. The latter Court even declared that though a person had made a general assignment, and, upon petition of creditors, on that ground had been adjudged a bankrupt and the title of the assignee thereby became void, nevertheless the trustee in bankruptcy would be compelled to resort to a plenary suit in order to recover from such assignee the assets in his hands.

In the case at bar W. T. Nugent, the son of the bankrupt, was his confidential clerk and agent, and acquired possession of the property in that capacity only, and both before and after the bankruptcy proceedings was holding it as such.

The finding of fact by the District Judge that an agency existed takes William T. Nugent out of the category of "third parties" "in adverse possession," holding under a fraudulent transfer, and he is an "other person," within the meaning of Section 2 (13) of the Act providing for the enforcement of obedience of lawful orders by bankrupts and other persons, and he, as such, is amenable to the same processes under the Act as the bankrupt himself.

The Court of Appeals, as we conceive, with all due respect, has misapplied the case of Bardes vs. The Bank, 178 U. S., page 524, in deciding that the District Court under the circumstances of this case has no jurisdiction to proceed by rule.

We submit that the Bardes case does not directly or re-

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motely decide that an agent of the bankrupt, holding as mere custodian, must be sued in an independent suit in order to compel him to surrender the bankrupt's estate. In the Bardes case this Court states the principal question involved in this language:

> "The present appeal from the final decree of the District Court dismissing the bill for want of jurisdiction, distinctly presents for the decision of this Court the question whether, under the Act of 1898, a District Court of the United States in which proceedings in bankruptcy have been commenced and are pending, under the Act has jurisdiction to entertain a suit by the trustee in bankruptcy against a person holding, and claiming as his own, property alleged to have been conveyed to him by the bankrupt in fraud of creditors."

It will be observed that this Court in this branch of that case undertook to decide whether suit might be maintained in the District Court against a person holding or claiming the property "*as his own*," which property was *alleged* to have been *conveyed to him by the bankrupt*, before the bankruptcy proceedings begun, in *fraud of creditors*.

In order to bring the case at bar within the ruling of the Bardes case, or to make it a parallel case, it is necessary that the case at bar should have been begun by an independent bill in equity in the District Court; and to have alleged that W. T. Nugent was holding the property and claiming it "as his own;" and that it had been conveyed to him by the bankrupt prior to the bankruptcy proceedings in fraud of his creditors. None of those conditions obtain here. The delivery to the agent or custodian as such, is not a parting with the title, nor a fraudulent transfer. The intention of the parties controls. (Ewing vs. Burnett, 11 Pet., 41.)

A differentiation is made between an agent holding assets of an estate without claim against the same, and one who is

holding property "as his own," though fraudulently transferred to him. In the one case the property is admittedly, at once, assets of the estate; in the other the property is not the assets of the estate, but must be made so. In the latter case, the transfer must be adjudged to be fraudulent, the title must be tried, perhaps the aid of a jury invoked, to have it then declared that the property shall be restored. Therefore, we submit that the Bardes case is not authority for the case at bar.

It will be observed, too, that this Court, further along in the opinion in the Bardes case, declared that it was decided under the Act of 1867 that a plenary suit was necessary in order to recover from a third party property conveyed to him before the bankruptcy proceedings if he was claiming adversely to the trustee (or assignee under the old law); so that throughout the entire case the question of whether the custodian holds as mere custodian, or holds adversely, is a vital one, in order to determine whether a plenary suit must be brought, or whether the Court may proceed by rule.

The Court of Appeals says:

> "But it is the exercise of jurisdiction to determine whether the circumstances are such that the possession is really in right of the bankrupt, or adverse to him or to the trustee."

It is not the "exercise of jurisdiction" simply to consider the preliminary question *in limine* as to whether or not there be jurisdiction. The first thing the Court must determine is the question whether it has jurisdiction. This is a mere preliminary inquiry. It is not taking jurisdiction of the action nor inquiring into the merits of the action. In the case at bar it was necessary for the referee, before whom the petition for a rule was filed, to inquire into that preliminary question, and in doing so he was compelled to ascer-

tain whether the respondent was claiming the property adversely or whether he held it as a mere custodian. Upon the settlement of this question depended the jurisdiction.

But we submit that the case at bar must not be tried by the test laid down in the above quotation from the Court of Appeals, for, because of respondent's failure to assert adverse possession, the referee was not called on "to determine whether the circumstances are such that the possession is really in right of the bankrupt or adverse to him or to the trustee."

That question, for this Court, was eliminated in two ways:

First: The respondent asserted no right or title to the property before the referee.

Second: The question of circumstances under which he held possession was conclusively found by the referee, and by the Judge, with respondent failing to assert ownership or adverse claim; and the question of fact is not a question to be considered by the Court of Appeals on petition for review, as it would be had appeal been allowed and taken under Section 25 of the Act. Only questions of law can be considered on review and the Act has been so construed by the Court of Appeals in the Sixth Circuit in the case of Cunningham vs. German Insurance Bank, 103 Fed., 932, and Courier-Journal Job Printing Co. vs. Schaefer-Meyer Brewing Company, 101 Fed., 699.

Again it was decided *in re* Rosser, 101 Fed., 652, by the Circuit Court of Appeals for the Eighth Circuit, that—

> "The effect of an adjudication in bankruptcy is to place all the property of the bankrupt, not exempt by law, in the custody of the District Court, and to charge the bankrupt and all other persons who have the possession or control of any of it, as trustee for the Court and for the trustee in bankruptcy who is subsequently appointed."

The same is held in the opinion of Judge Jackson *in re* Moore, 104 Fed., 869, quoted below.

The opinion of the Court of Appeals further says: "Let it be conceded that in the eye of the law the possession of the agent is that of the principal," etc. As we conceive it, this admission is inconsistent with the conclusion of the Court; for if W. T. Nugent was holding this property as the agent of the bankrupt, and if the bankrupt's estate is placed in *custodia legis* by the adjudication in bankruptcy, the agent must hold as trustee of the Court and its officer; and it follows that the Court certainly has the power to compel its agents or trustees to return to it or to its trustee in bankruptcy all property thus held. Moreover, it seems to us that that ruling would logically require the trustee to go into an independent suit to recover property in the pocket of the bankrupt himself (the contrary being held *in re* Purvine, 96 Fed., 192) if it requires him to adopt such a proceeding to recover possession from the bankrupt's custodian, for the possession of the agent is the possession of the principal.

If a suit were brought against the assignee under a general assignment, where bankruptcy had followed by reason of such assignment, the assignee in an independent suit would not be heard to dispute the title of the trustee in bankruptcy, because his title is already determined by the adjudication itself. He could only plead that he has possession under the assignment, and upon the filing of such a plea judgment by confession would follow. To require suit to be brought under these circumstances strikes us as making it necessary for the Court to submit to being trifled with, with possibly years of delay on appeal. Of course if the custodian, in good faith, was asserting any claim or colorable claim to the property a rule against him to deliver possession would have to be discharged at once, under the principles of the Bardes case; but in order to ascertain whether he was making such a claim a rule to show cause ought to be eminently proper.

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A court in bankruptcy, upon adjudication, coming into control of the *res*, surely has the power to inquire by rule, of one alleged to be an agent, why he shall not deliver over to the trustee in bankruptcy the property in the hands of such agent. The Court has the right to make its diagnosis, to have a proper statement of fact in response, showing whether such adverse holding exists; and if it exists, on such showing it must, under the Bardes case, discharge the rule. Otherwise, if such claim or facts are not made or shown.

Such a proceeding does not involve the title of the respondent, but merely shows to the Court, as it is entitled to know, whether an adverse claim exists; whether the property is assets of the estate; or whether there must be a separate and independent suit to determine that proposition. The rule is only what the respondent chooses to make it. If he shows adverse claim, color of title, title or ownership, there is nothing to do but let him go; and then the trustee may bring a plenary suit. But if the respondent shows nothing, except that he questions the jurisdiction of the Court to issue the rule, that jurisdiction is complete and the order to turn over ought to go.

Such a construction of the law as the Court of Appeals has given would lead to many useless suits, incurring thousands of dollars of expense without accomplishing any good results, and would entail great and unnecessary delay in the gathering in of the bankrupt's estate. In places where the State courts meet twice a year in many instances at least six months would be lost.

The evils of such a rule are clearly stated by Judge Jackson, of the West Virginia District, in the case of *in re* Moore, 104 Fed., 869, and the facts and reasoning are so in consonance with our ideas of the case at bar, the opinion being short, we take the liberty of quoting it in full:

> "The certificate of the referee, and the report of the trustee of the above bankrupt, which have been certified

to the District Judge, show that the bankrupt, just prior to the filing of the petition herein, turned over to his wife certain moneys and properties amounting to $300 in value, which properties she now refuses to turn over to the trustee, although admitting the receipt. The wife of said bankrupt has made no claim of ownership of said property, but simply claims, according to the record now before me, that she is advised by her counsel not to deliver possession thereof to said trustee unless ordered by Court. While title to property or moneys claimed by the trustee to belong to the bankrupt are not ordinarily to be tried by the District Court, and the claims of ownership of adverse claimants summarily be passed upon and determined by this Court, yet, the ownership not being contested, the trustee should not be driven to his action to obtain possession of property of the bankrupt, simply because such property is in the possession or custody of another now claiming ownership thereof. Were this the case, the trustee might be compelled to institute suit for every separate item of the bankrupt's estate not in the personal, physical possession of the bankrupt at the date of the adjudication; and the malice, caprice or whim of the bankrupt, or the various parties who chanced to have physical control of portions of the bankrupt's estate at that date, could, on any pretext, or without pretext, nullify the entire purpose of the Act. Fortunately the Bankruptcy Act is not subject to such an absurdity. As soon as the trustee is appointed and qualified he is vested with the title to the bankrupt's property. The vesting of the title gives him constructive possession of the property the instant the title passes. Such property is thereby brought into the bankruptcy court and placed in its custody and under its protection as fully as if in the visible presence of the Court. Being in the custody of the bankruptcy court, to interfere with or withhold it is contempt of such court, and may be punishable as such. Section 21*e* provides that a certified copy of the order approving the bond of the trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and is sufficient to authorize and require all custodians of such property, wherever situated, to deliver it to

such trustee. Section 70, Subd. 5, provides that the trustee shall be vested by operation of law with the title of the bankrupt to 'all property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.' Upon the facts of this case an order should be entered requiring Mrs. Moore to forthwith turn over to the trustee all property of the bankrupt of every description in her possession, and a failure to comply therewith would, upon proper proceedings had thereon, constitute a contempt of this Court."

The practice under the present law of taking the assets from the custodian by rule has been followed in several instances. *In re* Brooks, 91 Fed., 508, Judge Wheeler, by a rule compelled a purchaser, under purchase made after the filing of the petition in bankruptcy, to turn over the property to the trustee, even though the sheriff, who made the sale, had already levied upon the property prior to the proceedings in bankruptcy.

In White vs. Schloerb, 178 U. S., 542, this Court sustained the action of the lower Court in compelling, by summary process, the return of the bankrupt's goods, taken by a sheriff in replevin after the filing of bankruptcy proceedings, and this language is found in the opinion :

"The questions certified concern not the trial of the title to these goods, but only the judicial custody and lawful possession of them."

Thus it is shown that this Court intended to draw a distinction between an effort to try the title by rule and simply depriving one of possession who claims no title.

The facts in the case at bar show that the agency of W. T. Nugent was amicable and continuous, both before and long after the filing of the petition in bankruptcy ; and his con-

tention that he was an adverse holder never was made, or attempted to be made, until after the decision of the District Judge on review from the referee, and after the property came in *custodia legis*. Actual possession of the *res* is not necessary to put the property in *custodia legis*. (Adams vs. Mercantile Trust Co., 66 Fed., 617.) It was after the decision of the District Judge that respondent for the first time tried to assume the attitude of an adverse claimant; but in so doing he put himself in exactly the attitude of the sheriff in White vs. Schloerb, who sought to take the property after it came in *custodia legis*.

*In re* Raymond W. Kenney, 95 Fed., 427, Judge Brown of the Southern District of New York compelled a sheriff, who had collected monies on execution against the bankrupt before the proceedings in bankruptcy were filed, to deliver the same to the trustee.

*In re* Francis-Valentine Company the Circuit Court of Appeals for the Ninth Circuit held just the contrary to the ruling of the Circuit Court of Appeals in the Sixth Circuit in this case, and expressly declared that the District Court has jurisdiction, by summary proceedings, to compel a sheriff, who has possession of the property levied upon within four months before the institution of the bankruptcy proceedings, to surrender the same upon petition by the trustee.

So that we have one rule prevailing in the Ninth Circuit, the Southern District of New York, the District of Vermont and the District of West Virginia, and a contrary rule prevailing in this, the Sixth Circuit. Judge Gilbert, who rendered the opinion in the Ninth Circuit Court of Appeals, comments on the case of Marshall vs. Knox, 16 Wall., 551, which seemed to be opposed to his view, by showing that this Court in Marshall vs. Knox denied the right to proceed by summary process because "the landlord claimed the right thus to hold possession until his rent was satisfied. This claim was adverse to that of the assignee."

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W. T. Nugent in fact claimed no adverse title and it was so found upon the hearing before the referee, as well as by the District Judge. His possession is shown to be that of agent, in amicable possession, for three hours before and until long after the filing of the petition in involuntary bankruptcy. The filing of such a petition is a caveat to all the world, and is in effect an attachment and injunction. (Bank vs. Sherman, 101 U. S., 406.) His amended response, even had it been in time, even had it been offered before the referee, and before the case was decided by the District Judge, is not a proper response in any legal sense, for it is clearly demurrable and bad. To say that he did not have in his hands any amount of money which he held as agent or bailee; or that the same did not come to his hands as agent or bailee; or in any trust capacity; or that he held the fund adversely to the bankrupt, is pleading a conclusion of law. To make such pleading available he should have given the facts so that the Court could have determined whether or not he was holding as agent or trustee. For instance, he might have pleaded as did the landlord in Marshall vs Knox, *supra;* or that his father, the bankrupt, was indebted to him for salary, and that such funds were paid to him in satisfaction of such claim; or that he had paid out money for his father and received this fund in reimbursement for such payment; or that he had expended this actual money for his father's benefit, showing the details; and he should not have offered only conclusions of law as a response.

It seems to us that such an indefinite pleading, offered out of time, and after the decision in the case, attempting to contradict the previous findings of the referee and Judge, is not worthy of consideration; and that the Court ought not to allow such a response to be filed. In fact, though the referee would have been compelled to halt and discharge the rule, upon its appearing that W. T. Nugent had a *bona fide* claim to the funds in his possession, nevertheless, had

such response as was offered been made before him in the beginning, he would have been compelled to hold the same insufficient, because it left to W. T. Nugent and not to the referee the right to determine whether or not he was setting up a colorable claim. Surely a party who is ruled can not be given the right to determine by pleading mere conclusions of law whether or not there be jurisdiction to proceed against him. He must assert a sufficient claim, and when it is sufficient on its face then and then only, can the District Court be compelled to halt with its rule; but the Court, not the respondent, must determine the jurisdictional question.

On the whole we believe the construction given to "adverse possession" by the Court of Appeals is not only new but startling, and can not be sustained by any authority; that the motions to expunge should have been sustained, and that the principles of White vs. Schloerb, not those of the Bardes case, apply. A study of the Bardes case, sentence by sentence, line by line, word by word, reveals the idea and conclusion, that the doctrine, that it is a third party holding in adverse possession against the bankrupt, under a transfer alleged to be in fraud of creditors, runs through the whole opinion and permeates and colors every statement in it. No such elements exist or can be found in the case at bar.

As was said by Judge Wheeler *in re* Lewin, 103 Fed., 851 commenting on Bardes vs. Banks:

> "This is not a suit such as is mentioned in that clause of Section 23, but is an administrative proceeding of which the bankruptcy court has express jurisdiction." . . . .

Hence we ask that the writ, as prayed for, be granted.

Respectfully submitted,

WILLIAM W. WATTS,
*Counsel for Arthur E. Mueller, Trustee.*

JOHN RICHARD WATTS,
*Of Counsel.*

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SUPREME COURT U. S.
FILED
MAR 22 1901
JAMES H. McKENNEY,
Clerk

No. 576.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, . . . Appellant,

vs.

WILLIAM T. NUGENT, . . . . . Appellee.

*MOTION TO ADVANCE THE CASE FOR HEARING.*

*GROUNDS FOR MOTION TO ADVANCE.*

WILLIAM W. WATTS,
JOHN RICHARD WATTS,
Counsel for Arthur E. Mueller, Trustee.

P. C. NUEBACHER PRESS, LOUISVILLE, KY.

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# In the Supreme Court of the United States.

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ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, . . *Appellant*,

vs.

WILLIAM T. NUGENT, . . . . . *Appellee.*

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**To William T. Nugent, Appellee, and H. M. Lane, W. M. Smith, Zach Phelps, Fred Forcht, Jr., his Counsel.**

*Gentlemen:*

You are hereby notified that on Monday, March 25th, A. D. 1901, at the motion hour, we will enter a motion before the Supreme Court of the United States at Washington, D. C., to advance and hear the above styled cause on the earliest practicable day and will then file grounds in support of said motion.

Respectfully,

WILLIAM W. WATTS,

JOHN RICHARD WATTS,

*Counsel of Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, Bankrupt.*

Executed the above notice by delivering on the 15th day of March, A. D. 1901, a true copy thereof each to H. M. Lane, W. M. Smith, Zach Phelps and Fred Forcht, Jr., as attorneys for William T. Nugent, appellee. I am an adult person and not interested in anywise in this matter.

IRA C. MONEY.

Subscribed and sworn to by Ira C. Money before me this 15th day of March, A. D. 1901. My commission as Notary Public expires on the 12th day of January, A. D. 1904.

E. B. KERR,
*Notary Public within and for County of Jefferson, State of Kentucky.*

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No. 576.

# In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

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ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, . . . . *Appellant*,

vs.

WILLIAM T. NUGENT, . . . . . *Appellee*.

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## MOTION TO ADVANCE THE CASE FOR HEARING.

Now comes Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, by William W. Watts and John Richard Watts, his counsel, and moves this Honorable Court to advance and hear this cause at the earliest practicable day, and submits herewith his grounds for said motion.

## GROUNDS FOR MOTION TO ADVANCE.

This is the case wherein a petition for *certiorari* to the Sixth Circuit Court of Appeals was granted March 5th instant. The question of chief importance is whether the District Court in bankruptcy may by rule require the son of

the bankrupt, a mere agent or custodian of property belonging to the bankrupt, received by the custodian only three hours before the filing of a petition in involuntary bankruptcy, without claim of title to or ownership thereof, to produce and deliver the same to the trustee in bankruptcy in default of which such custodian may be committed for his contempt - whether the principles of the Bardes case or those of White vs. Schloerb, both reported in 178 U. S., apply, or whether a new rule is to be established for this as an intermediate or different case.

This case is of some gravity on its own account; but its import is largely augmented by other conditions.

The bankrupt law is new and but few of its provisions have been construed by this, the court of last resort. To the facts in other cases, somewhat similar to those herein involved, varying principles have been applied by several Circuit Courts of Appeal with contrariety of and diverse opinion resulting. Applying to this case the reasoning in some of the other decided cases, the trustee's prayer for relief would have been granted in the Circuit Court of Appeals and not denied as was done.

Compare *In re* Brooks, 91 Fed., 518,
*In re* Kenney, 95 Fed., 427,
*In re* Moore, 104 Fed., 869,
*In re* Rosser, 101 Fed., 562.
*In re* Francis Valentine Co., 94 Fed., 793
With *In re* Ward, 104 Fed., 985,
*In re* Abraham, 93 Fed., 767,
Opinion Court of Appeals in this case (R., p. 56).

This diversity of opinion has brought on a conflict; and, with such conflict, all is chaos on the questions involved, until this Court shall settle and determine them. Until a case

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comes into this Court, the Circuit Courts of Appeal, with the usual finality of decision, construe the law, making the law for the respective circuits. While the Constitution, Sec. 8, Sub-Sec. 4, Art. I, provides that the bankrupt law shall be uniform, those courts, appellate and ordinarily supreme, construe the law as best they see it; and hence it is that a creditor or other party, under present conditions, will find that he can not have the relief in one circuit that he may have in another.

But once the jurisdiction attaches to this Court, all that is changed—all courts must suspend their decisions, or have them clouded with doubt until this Court gives its construction.

The case at bar has been given wide publicity and there has been much comment on the opinion of the District Judge and that of the Circuit Court of Appeals.

5 Am. Bankruptcy Rep., 177.
3 Natl. Bankruptcy News and Rep., 216.

And the fact that this case is now pending in this Court will certainly have its effect on the courts of the country in delaying their action, whether the jurisdiction be original or appellate.

The principles of the Bardes case and White vs. Schloerb are discussed every day before referees and District Courts in bankruptcy. These questions, common to all the courts, are constantly arising; and the motion to advance this case is unlike the one in ordinary practice; for in the case at bar a statute, establishing courts in bankruptcy, jurisdiction, rights and remedies, is involved, and a speedy decision is of supreme importance to all the Federal Courts, including referees in bankruptcy, that they may be guided in their

every-day determination of the questions thereunder before them.

The plaint of Judge Lowell, of the Massachusetts District, in the case of *in re* Ward, 104 Fed., 985, in his comment on Bardes vs. Bank and White vs. Schloerb, is forceful. It is expressive of the wishes of all the judges and would seem to make unnecessary any further comment. He says:

> "It is greatly to be desired that a further exposition of the jurisdiction of the District Court in bankrupty should be made as speedily as possible by the Supreme Court, and if counsel for the petitioners shall desire to take this case directly to the Supreme Court, as is provided by Section 5 of the Judiciary Act of 1891, 26 Stat., 827, I will gladly facilitate proceedings to that end."

To the end that there be a uniform administration of the Bankrupt Act, and that there be no further doubt on the question involved, this case should be heard on the earliest practicable date.

Respectfully submitted,

WILLIAM W. WATTS,
JOHN RICHARD WATTS,
*Counsel for Arthur E. Mueller, Trustee.*

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No. 257.

# Supreme Court of the United States

OCTOBER TERM, 1901.

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, . . . Petitioner,

vs.

WILLIAM T. NUGENT.

*On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.*

## *BRIEF FOR ARTHUR E. MUELLER, TRUSTEE.*

WILLIAM W. WATTS,
Counsel for Arthur E. Mueller, Trustee.

JOHN RICHARD WATTS,
Of Counsel.

P. C. NUNEMACHER PRESS, LOUISVILLE, KY.

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No. 257.

# Supreme Court of the United States.

OCTOBER TERM, 1901.

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, PETITIONER,

vs.

WILLIAM T. NUGENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## BRIEF FOR ARTHUR E. MUELLER, TRUSTEE.

This cause originated under the bankrupt act of 1898 in certain proceedings before John B. Baskin, a referee in bankruptcy, for the District Court of the United States for the Kentucky District. An order of the referee, on petition for review, was reviewed by the judge of that court, who sustained the order of the referee. Thereupon, on petition for review, the Circuit Court of Appeals for the Sixth Circuit reversed the case; a petition for *certiorari* was then granted by this court for its consideration of the case.

## Statement of the Case.

Edward B. Nugent, the bankrupt, had for many years been doing business at Louisville as a dry goods merchant. At the time of his failure he was the owner of a stock of dry goods and a house and lot of land in Louisville.

On February 9, 1900, he mortgaged his house and lot for $4,500.00, which after the payment of certain commissions and taxes netted him $4,133.45. This money he delivered to his son, the respondent, William T. Nugent, his confidential clerk, agent and bailee (R. 16).

On February 19, 1900, ten days later, he sold his stock of goods, all his then available assets, to one Hermann Straus for $12,000. This money was paid by check, which he in turn endorsed and delivered to his son, the respondent, as his agent. The check was immediately cashed, and, after the payment of some rent and commissions on the sale, there remained of that sum in the hands of the agent $10,100. The check was received by the bankrupt and delivered to the agent about the hour of 2 o'clock in the afternoon. He was then holding, as agent, the net sum of $14,233.45 (R. 16, 17, 18).

At 5 o'clock in the afternoon of February 19th, the day on which the check for $12,000 was received, and three hours after its receipt, certain creditors filed proceedings in involuntary bankruptcy in the District Court at Louisville (R. 13) against the bankrupt, Edward B. Nugent, and he was regularly adjudged and the case was regularly referred to the referee at the time of all the proceedings and all the matters complained of by the respondent (R. 37).

The petitioner, Arthur E. Mueller, was then elected trustee of the estate, and thereafter, at his instance, a rule was issued by the referee against the bankrupt to show cause why

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he should not deliver over to the trustee the fund of $14,-233.45, which was alleged to be in his possession or under his control. He appeared, and the depositions of himself, his daughters and numerous others were taken (R. 16), and thereupon, after a hearing, he was ordered to turn over the fund. On his failure to do so the referee certified the matter to the judge with recommendation that the bankrupt be punished for his contempt. Before the judge the bankrupt's counsel explicitly stated that their client was not of unsound mind. But afterwards there was a change of front, and a suggestion was made in writing that the bankrupt, eighty odd years of age, was of unsound mind. On a hearing the court reluctantly released the bankrupt because of his approaching senile imbecility, but with leave to the trustee to again bring the matter before the referee should developments make it in his judgment proper (R. 38).

On April 13, 1900, the trustee filed a petition before the referee, setting up certain facts alleging that the monies constituted a fund in the hands of William T. Nugent, the respondent, and said fund was a part of the estate; that respondent did not hold the same as a debtor. The petition prayed for an order enjoining and restraining him from disposing of the fund and directing him to turn over to the trustee all or such part of said fund as was in his (respondent's) hands (R. 13, 14, 15). The injunction was granted, and a show cause order was entered requiring the son to show cause in five days after service why he should not deliver over to the trustee the fund in question. (Referee's report, R. 15, 16.) On October 8, 1900, respondent was served with a copy of the order (R. 16), and on October 13 filed his response (R. 19), in which was contained three propositions, viz.:

1st. A denial of the jurisdiction of the court to make the show cause order.

2d. That at no time *since* the filing of the petition in bankruptcy had he received said fund or any part thereof.

3d. That he had been indicted by the Federal Grand Jury for that court, and was then being held for trial thereunder, and that his response in regard to said matters would tend to incriminate him thereunder.

The respondent made no test of the sufficiency of the petition by demurrer, objection or otherwise. He made no objection to the time given for response, but responded as stated. It was then stipulated that the depositions of the bankrupt and others theretofore taken should be read on the hearing of the sufficiency of the response (Referee's certificate, R. 17), and thereupon the matter was heard.

On the hearing the referee found the fact to be that the respondent held the fund as the agent or bailee—the mere custodian of the bankrupt; that it was the property of the bankrupt without adverse claim in respondent and became and still is the property of the petitioner as trustee; and adjudging the response insufficient, ordered respondent to turn over the fund to the trustee, on or before 9:30 A. M., October 17, 1900. (R. 15, 16, 17, 18.)

On respondent's failure to comply with the order at the time mentioned, the referee certified respondent to the judge, recommending that he be punished for his contempt, and that he be committed until he complied with the order. (R. 20, 21.)

At the same time respondent filed a petition for review by the judge (R. 21), whereupon the referee filed his certificate as required by form 56 and general order 27 prescribed by this court, in which he set forth the question presented, a summary of the evidence and his finding and order thereon. (R. 15, 16, 17, 18.)

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Respondent sought to review only the order requiring him to deliver the fund. He has not reviewed the order of April 13, 1900, granting the injunction, nor the show cause order granted that day. He reviewed only the order entered October 16, 1900 (R. 21), an important fact in view of the motions to expunge as hereinafter set forth.

The judge, after the hearing, *and having before him the depositions of the respondent's father, the bankrupt, respondent's sisters and others filed with the referee's certificate* (R. 16), rendered an opinion (R. 22), in which the finding of the referee was sustained. We quote from it the following forcible language, to-wit:

"The court finds the facts of the case to be as above stated, with the addition that the entire amount, $14,233.45, is the property of the bankrupt's estate alone; that it had been taken possession of and was held by W. T. Nugent as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim of right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in anywise to have claimed it adversely to the bankrupt or the trustee. (R. 25.)

. . . . . .

"Our conclusion is that upon the grounds indicated this case appears to call in the most vehement manner upon the court to exert all its powers to get this large sum of money out of the hands of this unfaithful bailee for the benefit of the bankrupt's creditors.

"Over $14,000, which manifestly belongs to the creditors and not in any sense to the respondent, have been received by the latter in the manner indicated, and is held by him under circumstances which present no appeal to the sympathies of any right-thinking man, and

if under the facts shown his retention of this fund may be allowed, and if such retention is sanctioned by the court, and if it be so easy by this species of jugglery between a bankrupt father and his son—if that be so easy of accomplishment—the rights of creditors in such cases may be defeated with an ease and completeness that would make involuntary proceedings in bankruptcy a somewhat laughable mockery. This characteristic will not be willingly impressed upon such proceedings by this court.

"Of the contention of respondent that he can not respond freely lest he criminate himself, it may be further remarked that there was the easiest possible way to avoid this by paying the money into court, and there making any claim to it that he had, so that the questions could be settled here. There has been no effort made either to pay the money or to state any fact to enable the court to decide whether the respondent has any sort of claim to it or any reason to present why he should not place it where the creditors who are entitled to it may get it.

"To sum up the whole matter: The respondent has the money in his hands as agent or bailee only. His possession is that of his principal. His principal was his father up to a certain stage of these proceedings, but whether up to the filing of the petition or up to the adjudication we need not stop to inquire, as it is immaterial in this case. At one or the other of those times his principal, by operation of law, was changed, and an officer of this court was substituted for his father. That change in no way lessened the duty of paying the money to the proper principal upon notice and demand. After the change, however, the money was potentially in the custody of the law in these proceedings and subject to the orders of the court. The rule and its service constituted sufficient notice and demand." (R. 28.)

After the delivery of the opinion, Nugent, being in court, was called to the bar to receive sentence; whereupon at the request of his counsel the judge deferred passing sentence for two days. At the expiration of

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said two days said respondent, by his counsel, tendered an amended response (R., p. 30), in which for the first time he sought to answer, in general terms, and with conclusions of law only, that the fund in question was held and claimed by him adversely to the bankrupt or his estate. The judge, on the theory that the hearing was in the nature of an appeal from the decision of the referee, refused to permit that response to be filed, holding that it manifestly came too late (R., p. 29); that such response should have been filed before the referee at the time of the hearing upon the rule. That amended response so offered was neither filed generally nor for the purposes of appeal or review. It bears no endorsement of its having been filed.

In refusing to permit said amended response to be filed, the court entered the following order:

> "Came William T. Nugent, respondent herein, and tendered an amended response and moved to file same, and the court not having postponed the imposing of the sentence for that purpose, and being of the opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed.
>
> "And thereupon, pursuant to the opinion of the court filed herein on the 1st instant, it is the judgment of the Court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson County, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.95, or otherwise satisfy the said trustee with respect thereto; and the court reserves the right and power to suspend or set aside the judgment and sentence upon the delivery, payment or satisfaction aforesaid.
>
> "To all of which the respondent, William T. Nugent, excepts." (R., p. 29.)

Thereafter said W. T. Nugent, under Section 24*b* of the act, filed a petition for review in the United States Circuit Court of Appeals, praying that the orders, judgment and sentence of the District Court be reviewed and revised in the matter of law, etc. (R., p. 1.)

Up to that time the case rested alone upon Nugent's response. And the gist of that response was that the court did not have jurisdiction to make him show cause. It was upon that state of case that the referee and the judge tried and determined the matter.

But on Nugent's review to the Circuit Court of Appeals, a widely different case was presented. He not only filed as an exhibit to his petition the amended response, which never was made part of the record, for the purpose of appeal or review, or by bill of exceptions, but in his petition for review he went outside the original response and outside that amended response, and incorporated therein matter wholly new and never before the court below. In fact, he presented to the appellate court a case which did not exist, which had not been tried.

His Honor, Judge Lurton of the appellate bench, was anxious to dispose of the case at an early day (R. 10). For that reason the motions to expunge (R. 8, 9, 10) the irrelevant matter were by stipulation (R. 10) made and argued at length at the hearing instead of preliminarily thereto, but no attention seems to have been paid to the motions to expunge, and the irrelevant matter still flourishes in the petition for review to that court.

The Court of Appeals heard the case and determined it on December 13, 1900, delivering a memorandum opinion (R. 41), whereon it issued its forthwith mandate in contravention of its rules, Nos. 29 and 32, set forth in our petition for *certiorari*, as follows:

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"29a. A petition for rehearing after judgment can be presented only within thirty days after the day when the printed opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines.

"32. In all cases finally determined in this court a mandate or other proper process in the nature of a *procedendo* shall be issued, on the order of this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

"Such mandate shall not issue until time has elapsed for filing a petition to rehear, as defined by rule 29; and no mandate or other process or *procedendo* shall issue when a petition to rehear is pending, unless specially ordered.

"Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case."

By that mandate W. T. Nugent was immediately released from custody, and that before this petitioner could apply for a rehearing in that court or *certiorari* here.

On the 17th day of January, 1901, said Circuit Court of Appeals filed a printed opinion in the cause. (R. 43.)

On February 26, 1901, a petition for *certiorari* was filed in this court, and, being granted a week later, a motion to advance was sustained and the case set for October 28th for argument.

As required by rule 21 of this court, we, therefore, state as the errors relied upon, the following:

1st. The Court of Appeals erred in failing to sustain the motions to expunge.

2d. The Court of Appeals erred in holding that a plenary suit and not a summary process was the remedy in this case, under which the court below was reversed, its order set aside and respondent released from his commitment.

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## The Motions to Expunge.

In the case of the Courier-Journal Job Printing Co. vs. Schaeffer–Meyer Brewing Co., 101 Fed. 699, involving the administration of a bankrupt's estate under the present bankrupt act, the Circuit Court of Appeals for the Sixth Circuit, in speaking of the practice on petitions for review to that court, used this language:

> "No rule or order has been made by the Supreme Court regulating the practice under the 24th section, and none has been prescribed by this court."

In that case a petition for review was filed. The respondent filed an answer, whereupon the petitioner filed a reply. Thereafter the respondent filed an amended answer, and the petioner filed an amended reply.

It seems to us that in that practice there is no occasion for any such pleadings; that some check ought to be placed on the pleader, for if not we may view the spectacle of rebutters and surrebutters, with proof to be taken not only on the new case thus made up, but upon the question of what were the issues below; and the case at bar furnishes a very good medium by which the pleading and practice may be regulated by decision of this court. For our contention is that the respondent in this case, by virtue of including in his petition for review important and material allegations not in the record below, has attempted to make a new case not justified by the record, either before the referee or the district judge.

The motions to expunge the irrelevant and impertinent matter were not idly made, but were made because of their supreme importance, as it seemed to us. *Based upon the relevant matter alone, the court certainly had jurisdiction of*

*this case. Based upon the irrelevant matter, the court might possibly be ousted of its jurisdiction.* And though elaborately argued, both orally and on brief, in the Court of Appeals, that court neither intimated that it ignored the irrelevant matter nor that it concerned itself about it, evidently deciding the case with that matter as a part of it.

On petition for review, in revision of matters of law, as provided by Section 24*b* of the act, the record below, as in all other cases, whether by appeal or otherwise, should be the record above; and impertinent, irrelevant or extraneous facts ought not to go into the record above; and it seems absurd that the allegations in the petition for review in matters of law were such that there had to be, subject to the motions to expunge, an answer in this case, or rather stipulations showing denials of the affirmative allegations of the petition for review, as is shown on page 10 of the record. Such practice we submit is unheard of.

Under the act of '67 the office of register was vastly different from that of referee under the present act. By Sec. 5009 of the former act it was provided that the register should, in the event of a contest between parties to the proceedings, deliver to the judge the two sides of the case in writing, as stated by the parties, whereupon the judge should decide the contest. The language of the statute is as follows:

> "Sec. 5009. In all matters where an issue of fact or of law is raised and contested by any party to the proceedings before any register, he shall cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge."

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It is therefore seen that the register had few, if any, of the powers of the judge; that he was limited to the office of clerk, merely performing those matters of course arising in the administration of the estate.

The act of '98, however, creating the office of referee, makes that officer, upon a general order of reference, an assistant to the judge; makes him the court for all purposes except such as are limited to the judge alone.

> "Court shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee." Sec. 1 (7).

Among the powers of the court fixed by Section 2 are:

> "(6) Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy. (7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided. (13) Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment. (15) Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. (16) Punish persons for contempts committed before referees."

Under the heading of "Jurisdiction of Referees" the act provides that the referee is invested with jurisdiction to—

> "perform such part of the duties except as to questions arising out of the application of bankrupts for compositions or discharges as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts except as herein otherwise provided." Sec. 38*a* (4).

And this court, in construing the act, through its general order 12, entitled "Duties of the Referee," provides for a general reference in these words:

> "And thereafter all the proceedings except such as are required by the act or by these general orders to be had before the judge shall be had before the referee."

On an adjudication and reference to the referee he has jurisdiction of all the powers conferred upon the courts of bankruptcy under Sec. 2, excepting such as may be specially confined to the judge alone.

And as gathered from the act and general orders, those powers which can not be exercised by him are:

(1) A granting or refusing a discharge; (2) the confirmation or rejection of a composition; (3) enjoining proceedings of a court, United States or State officer; (4) commit for contempt; (5) order the seizure of property by a receiver or marshal prior to adjudication.

Sec. 38*a* (3) applies only to the seizure of property by the marshal or a receiver, as provided by Section 2 and by Section 3*e* and Section 69, when upon proper showing and proper bond *before the adjudication*, the judge, or in his absence, the referee, on a hearing, will order the seizure of the bankrupt's property. And even if the steps taken in this case could be construed to be a taking of possession or releasing the property as set forth in that Section 38, the section could not cover this case, because at the time of the order *it had already been referred to the referee under a general reference.*

So that *after a reference* to him, a referee, as the court, under Section 2 of the act, may bring in parties; may grant injunctions against other than courts or officers; may appoint receivers; may make all necessary orders, and has all the

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powers of the court except those specially reserved to the judge. He then is the court, made so by the act itself and this court in construing it; and in the case of White vs. Schloerb, 178 U. S. 542, it was said:

> "Under Sec. 33–43 of the Bankrupt Act of 1898, and the Twelfth General Order in Bankruptcy, referees in bankruptcy are appointed by the Courts of Bankruptcy and take the same oath of office as Judges of the United States Courts. Each case in bankruptcy is referred by the Court of Bankruptcy to a referee, and he exercises much of the judicial authority of that Court."

In the case of Pirie vs. Chicago Title & Trust Co., decided May 27th last, this court affirmed the order of a referee adjudging that Pirie's claim be reconsidered and rejected, and that a dividend paid thereon should be returned.

It may then be said that the referee's office is "a first court in bankruptcy." The orders of the referee may be reviewed by the judge. This court further construing the act has made general order 27, which provides for a petition for review to the judge, and has established form 56, under which, when such review is desired, the referee shall certify to the judge the question which was presented, a summary of the evidence and his findings and order thereon.

The review is in the nature of an appeal and the referee's certificate the record on which the case is reviewed. Complaint may be made to the referee or to the judge if the certificate is not complete or is insufficient, or a part of the original record is desired on review to the judge; but without that complaint the certificate, with the proceedings in the upper court, based thereon, make up the case, whether it stops at the judge or goes on through to the Circuit Court of

Appeals and the Supreme Court of the United States, as has this case.

Something was meant by the Congress and this court in the establishment of all that machinery for the relief of the judges; for the quick and speedy obtention of finality in litigation at small cost. Immense volumes, making up the bankrupt's books of account, are examined in the referee's office. Hundreds and even thousands of pages of testimony are there taken; and it is evident that it was intended that the record on review for the convenience of the judge and the upper courts, for economy to the litigants, should be made up under form 56, and that certificate should then control the upper courts in their decision.

Cunningham vs. German Insurance Bank (C. C. A)., 103 Fed. 932.

Courier-Journal J. P. Co. vs. Schaeffer-Meyer Brewing Co. (C. C. A.), 101 Fed. 699.

The motions to expunge will be found on pages 8, 9 and 10 of the record, and we take up the objectionable parts *seriatim*.

*First*: "On February 17, 1900." (R. p. 1, sixth line from the bottom.)

There is no such date in either the report of the referee or the opinion of the district judge. It should have no place in the petition for review.

*Second*: "Upon the 13th day of April, 1900." (R. p. 2, fourth paragraph, eleventh line thereof.)

Nugent was not brought before the referee on the 13th day of April, 1900, but was brought before the referee in October, 1900; the date mentioned is not shown in either the certificate of the referee or the opinion of the district judge, and should have no place in the petition for review.

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*Third:* "And that he was thereupon over his objection and that of his counsel required to be sworn and examined in regard to said matter; but—" (R. p. 3, third paragraph, first, second and third lines thereof.)

Nugent filed with his petition for review his deposition, which was taken before the referee. It will be found as exhibit No. 12 on page 33 of the record.

That deposition was no part of the proceedings against W. T. Nugent, and as per stipulation page 37 of the record that deposition was taken in pursuance of Section 21 of the act of 1898, for the general purposes of the estate only, and that deposition had never been certified to the judge of the District Court, and same was never before him under the certificate of the referee. The motion to expunge includes that deposition, and it should have no place in the petition for review, and his allegation that he offered his objection, was sworn and examined in regard to the matter, is untrue, so shown by the record, and should also have no place in the petition for review.

*Fourth:* "He says that he was so advised by his attorneys and believed that his response in reference to these matters would tend to incriminate him under said indictment." (R. p. 5, second paragraph, 8th, 9th, and 10th lines.)

*Fifth:* "That he was at the time arrested and in jail, under said indictment, from whence he was brought in custody of an officer to make said response, and still so remains in jail." (This allegation immediately follows the lines last above quoted.)

*Sixth:* "That but for these reasons he could and would have responded fully, and could and would have shown that he was not in contempt of the court, and that when the referee held his response as a whole insufficient he would

have filed an amended response, but for the fact that the referee stated and so held that he could not be examined or required to answer as to such matters as would tend to criminate him under said indictment." (These lines immediately follow those last above quoted.)

These allegations ought to be eliminated, as they should have no place in the petition for review. The Debs case, 158 U. S. 564, disposes of the indictment in the following language:

> "A court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws, nor invading the constitutional right of trial by jury. . . .
>
> "The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. . . .
>
> "And it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction."

The next objectionable allegation is found in the record, page 5, immediately following the matter in 4, 5, and 6, as above shown. It reads as follows:

*Seventh:* "He says that he had no notice of the filing of the petition or the application for the injunction herein thereon, and that the same is irregular and void, and said referee had no right to grant or issue said injunction or rule thereon."

The order granting the injunction was entered April 13th, *and was never reviewed or appealed from and is not before this court*, and any reference to the injunction is irrelevant. As to notice of the filing of the petition for rule, the rule to show cause itself gave notice upon service, and no objection was ever made before the referee or the judge based on want of notice. This matter ought to be eliminated.

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*Eighth:* "And it is shown that he held same adversely to the said E. B. Nugent and as transferee before the filing of said petition." (R. p. 5, second paragraph, 28th, 29th, and 30th lines.)

This averment is untrue and is not shown in either the certificate of the referee or the opinion of the district judge.

As shown in the referee's certificate (R. 16), Nugent agreed by stipulation that various depositions then taken should be read on the hearing of the response to the rule; and the finding of the facts by the referee and district judge below are conclusive on the review in matters of law under Sec. 24*b*, and the referee and the judge found that Nugent had the fund and did not hold it adversely. This allegation, therefore, ought to be stricken out.

*Ninth*: "He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use, he being a creditor of said Nugent, and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy or the appointment of said trustee or the adjudication herein, and that there was no evidence to the contrary or that he had any of said money on hand or under his control when he was served herein as stated." (R. p. 5. These lines immediately follow those last above quoted.)

This matter was never before either the referee or the judge, nor was it included in the amended response which was attempted to be filed, and it is original matter with the petition for review and the first notice of any such contention given to the trustee, as is shown on a reading of the record. Clearly an appellant or petitioner for review can not change the issues in the case in the appellate court. This matter has no place in the petition for review and should be stricken out.

*Tenth*: "He, as advised, states and charges that the contempt for which he is proceeded against and held herein in a

civil contempt, a failure to pay money which he is ordered by the court to pay, for the benefit of others, and that, as also shown by the proceedings herein, his failure to answer fully in said matter is due entirely to the fact that he stood indicted, and was not required to answer, and the further fact, as he was advised, that the court had no jurisdiction, and that upon the determination by the court that it had jurisdiction, this petitioner offered said amended response; under which, had he been permitted to file same, he could and would have shown as therein stated." (R., p. 5. These lines immediately follow those last above stated.)

This allegation is disposed of by the Debs case and has no place in the petition for review. Further, the amended response was not offered before the referee, but only before the judge after the decision and opinion.

The motion to expunge also includes the striking out of exhibit No. 2, filed with the petition for review, to wit: "An order and release of E. B. Nugent."

This order and release is not on review, and it has no place with the petition therefor.

The motion to strike out includes exhibit No. 12, "The Deposition of William T. Nugent." It has been explained that as shown by the stipulation (R., p. 37) that deposition was taken in pursuance of Section 21 of the act for general purposes of the estate only, and that same has never been before the referee or the district judge in this matter. It clearly has no place in the record.

The motion to expunge also includes exhibit No. 11 filed with the petition for review, to wit: the "Amended Response and Copy of Indictment." That amended response was never offered to be filed before the referee, but being satisfied with his position, Nugent had the case as it then stood reviewed by the judge. The judge after hearing the

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case brought in his opinion (R., p. 22), and two days thereafter the amended response made largely to conform to the opinion of the court was offered. The judge, holding the case to be before him on review in the nature of an appeal, entered an order, part of which we wish to quote at this stage, to wit:

> "Came William T. Nugent, respondent herein, and tendered an amended response, and moved to file same, and the court not having postponed the imposing of the sentence for that purpose, and being of opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed."

Insisting that the judge was right in refusing to file the paper because the case was before him in the nature of an appeal, it, at least, was within his judicial discretion to refuse to receive it when the case had been heard and determined, and a written opinion delivered by him. The exercise of such discretion at that stage of the case will not be disturbed on appeal or review.

Neale vs. Neale, 9th Wallace, 1.

Since the salient feature of that paper (R., p. 38) is this: "He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent, or any such money at any subsequent date thereafter, was not received or held by this respondent as agent or bailee or in any trust capacity whatever, but was held adversely to said E. B. Nugent," we contend that it was but a sham, a subterfuge, built to avoid the effect of the decision of the court rendered two days before; and that even if the filing of an amended response was allowable before the judge, at that stage of the

proceedings, such a conclusion of law as was alleged, all the circumstances of the case considered, would not be accepted. Facts on which to base intelligent action should be stated.

> "A plea that at the time of the bringing of this suit and long prior thereto this defendant was and still is in the open, notorious, continuous and exclusive possession of the said premises, as the sole owner thereof, and claiming and holding adversely to the complainants and the whole world, is bad in that it consists of conclusions of law." McCloskey vs. Barr., 38 Fed. 165.

On the motion, out of time, to file a pleading against objection, the court may look to the sufficiency of the pleading in its determination of the motion to file.

After the failure to amend the response before the referee, it was proper for the judge to refuse to allow the amendment to be filed, when Nugent had stood by his response, waited till after the hearing on review, and, after the case was decided by the judge, then offered, with conclusions of law only, a demurrable amendment, which in general terms tried to avoid the effect of the opinion of the judge, rendered two days before, in deciding the case.

It is not proper practice that a party shall wait to see what the court will decide, on review or otherwise, before he puts in his defense.

The Court of Appeals is not a court of original jurisdiction, and issues are not to be joined there, or proof taken there on such issues.

Stripping the record of the irrelevant matter, as we hope the court will do, the case stands on the certificate of the referee to be revised in the matter of law. The facts as found by him and the judge are, that Nugent, the son, the agent or

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bailee, the custodian of the bankrupt, received the great bulk of this money within three hours of the time of the filing the petition in involuntary bankruptcy.

While the trustee's title might not go beyond the date of the adjudication, the filing of that petition was a *caveat* to all the world as well as to the respondent.

Bank vs. Sherman, 101 U. S. 406.

Any claim of title or adverse possession to be made by respondent must have arisen at the delivery of the fund at two o'clock in the afternoon, or certainly between that time and five o'clock in the afternoon, the time of filing the petition—a period of three hours in all. It was agreed by Nugent, as shown by the referee's certificate, that the depositions of Edward B. Nugent, respondent's father, the bankrupt, the Misses Nugent, his sisters, and numerous others should be read on the hearing of the response. On the hearing the referee found the fact to be that respondent as agent or bailee of the bankrupt, as a mere custodian, had received the fund; and that, without title or color of title in himself or adverse claim thereto; that the fund was the property of the bankrupt; that it belonged to the bankrupt's trustee. Any reference, therefore, to extraneous matters ought, on motion, to be stricken out.

## Plenary Suit or Summary Process—Which?

In our petition for *certiorari* and argument filed February 26, 1901, we asked these questions:

> "Does the Bardes case or White vs. Schloerb apply?"
>
> "Both cases were decided on the 28th day of May, 1900, and are reported in 178 U. S., pp. 524 and 542, respectively. The one deals with him who holds assets of the estate in adverse possession coming to his hands before the bankruptcy proceedings. The other deals with him who seizes the assets after the bankruptcy proceedings had begun and when the property had come in *custodia legis*. This Nugent case is intermediary, and deals with one coming in possession three hours before the institution of bankruptcy proceedings, yet who holds the assets as agent only without adverse claim. Which of the cases decided by this court applies—Bardes vs. Bank or White vs. Schloerb? Or does it devolve on this court now to formulate other principles applying to and covering the case at bar?"

This court has answered those questions in the decision of Bryan vs. Bernheimer delivered on April 15th last.

It is perfectly plain that the Bardes case deals with a *suit of the trustee* against a third party to recover from him *property fraudulently transferred* to him by the bankrupt *before the filing of the petition in bankruptcy*, and which that third party *claims as his own.*

It is equally plain that White vs. Schloerb deals with *a rule against one taking property away from the court's possession.*

It is just as clear, we think, that the Bernheimer case deals with one, *whose agency to the bankrupt being established,*

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will be summarily ordered by the court to turn over property coming to his possession, before the filing of the petition, *without beneficial claim in him.* The opinion opens with the statement:

> "The general assignment made by Abraham to Davidson did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors."

True, there was a receiver's application for the property before election of a trustee; true, Bernheimer answered consenting to the jurisdiction; and true, Bernheimer had purchased with notice of the bankruptcy proceedings; strong concomitant parts of that decision, yet we believe not necessary to sustain the principles of the case, since the agency under the deed of assignment was established. The truth of that proposition may be easily tested. Take the assignment or establishment of the agency from the case and the case falls to the ground. Leave it there and take away the other concomitants and the decision will remain.

And how does the agency under that deed of assignment differ from the bankrupt's statement that he had turned over the money to his son as his agent? Not at all. It may be said that the assignee's acceptance of the trust estopped him from denying it. That may be true; and Nugent's silence on the subject when called upon to respond to the rule avails him nothing and but assists in establishing his agency.

In contra-distinguishing the Bernheimer case from that of Bardes, the court said:

> "The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself."

Just so with the case at bar, for we are dealing with an agent without claim of adverse interest in himself—with an "other person" within the meaning of Section 2 (13) of the act, when the court may "enforce obedience by bankrupts and other persons to all lawful orders, by fine or imprisonment." And where by Section 2 (7) it will "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto." The court will deal with this agent just as it did with Davidson, the agent in the Bernheimer case. The last paragraph of that opinion directs that Davidson be brought into the case under Section 2 (6), in order that full justice might be done Bernheimer concerning the money in Davidson's hands —the proceeds of his principal's property.

The Court of Appeals was probably misled in its understanding of the Bardes opinion. It understood that it mattered not what was the possession, a plenary suit only could be maintained. Its language (R. 47) speaking to the Bardes case follows:

> "But such language was meant, as we understand from its context, to include all holdings as adverse when the circumstances are such that the property cannot be recovered without resort to legal remedies. For the reasons given for the decision would apparently include all such cases. In the case of a general assignment for the benefit of creditors, the assignment being void, the assignee's possession is without right, and the title as well as the right to possession is in the assignee (trustee). But if the latter cannot recover the property otherwise than by legal proceedings, he must resort to the ordinary legal remedies. We perceive no valid distinction between such a case and any other where there is an adverse holding in fact by one not a party to the proceedings, no matter what the character of such possession may be in point of law."

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That opinion was delivered *before* the promulgation of the one in the Bernheimer case.

The Court of Appeals (R. 46) says:

> "But it is the exercise of jurisdiction to determine whether the circumstances are such that the possession is really in right of the bankrupt, or adverse to him or to the trustee."

It is not the "exercise of jurisdiction" simply to consider the preliminary question *in limine* as to whether there be jurisdiction. The first thing the court must determine is the question whether it has jurisdiction. This is a mere preliminary inquiry. It is not taking jurisdiction of the action nor inquiring into the merits of the action. In the case at bar it was necessary for the referee, before whom the petition for a rule was filed, to inquire into that preliminary question, and in doing so he was compelled to ascertain whether the respondent was claiming the property adversely or whether he held it as a mere custodian. Upon the settlement of that question depended the jurisdiction.

This proposition is easily tested. Say, for instance, that to a bill in equity the defendant pleads to the jurisdiction, denying diverse citizenship. Would a mere denial or statement that the citizenship was not diverse alone stop the case? Not at all. But the court would be forced to its inquiry of whether it had jurisdiction. How? By proof, as in the case at bar.

But we submit that the case at bar must not be tried by the test laid down in the above quotation from the Court of Appeals, for, because of respondent's failure to assert adverse possession, the referee was not called on "to determine whether the circumstances are such that the possession is

really in right of the bankrupt or adverse to him or to the trustee."

That question, for this court, was eliminated in two ways:

*First:* The respondent asserted no right or title to the property before the referee.

*Second:* The circumstances under which he held possession were conclusively found by the referee, and by the judge, with respondent failing to assert ownership or adverse claim; and the question of fact is not a question to be considered by the Court of Appeals on petition for review, as it would be had appeal been allowed and taken under Section 25 of the act. Only questions of law can be considered on review under Section 24*b*, and the act has been so construed by the Court of Appeals for the Sixth Circuit in the case of Cunningham vs. German Insurance Bank, 103 Fed. 932, and Courier-Journal Job Printing Co. vs. Schaeffer-Meyer Brewing Company, 101 Fed. 699.

The opinion of the Court of Appeals further says:

> "Let it be conceded that in the eye of the law the possession of the agent is that of the principal," etc.

As we conceive it, this admission is inconsistent with the conclusion of the court; for if W. T. Nugent was holding this property as the agent of the bankrupt, and if the bankrupt's estate is placed in *custodia legis* by the adjudication in bankruptcy, the agent must hold as trustee of the court and its officer; and it follows that the court certainly has the power to compel its agents or trustees to return to it or to its trustee in bankruptcy all property thus held. Moreover, it seems to us that that ruling would logically require the trustee to go into an inde-

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pendent suit to recover property in the pocket of the bankrupt himself (the contrary being held *in re* Purvine, 96 Fed. 192) if it requires him to adopt such a proceeding to recover possession from the bankrupt's custodian, for the possession of the agent is the possession of the principal.

If a suit were brought against the assignee under a general assignment, where bankruptcy had followed by reason of such assignment, the assignee, in his answer, would not be heard to dispute the title of the trustee in bankruptcy, because his title is already determined by the adjudication itself. He could only plead that he has possession under the assignment, and upon the filing of such a plea judgment by confession would follow. To require suit to be brought under these circumstances strikes us as making it necessary for the court to submit to being trifled with, with possibly years of delay on appeal. Of course if the custodian, in good faith, was asserting any claim or colorable claim to the property, a rule against him to deliver possession would have to be discharged at once, under the principles of the Bardes case; but in order to ascertain whether he was making such a claim a rule to show cause ought to be eminently proper.

A court in bankruptcy, upon adjudication, coming into control of the *res*, surely has the power to inquire by rule, of one alleged to be an agent, why he shall not deliver over to the trustee in bankruptcy the property in the hands of such agent. The court has the right to make its diagnosis, to have a proper statement of fact in response, showing whether such adverse holding exists; and if it exists, on such showing it must, under the Bardes case, discharge the rule. Otherwise, if such claim or facts are not made or shown.

Such a proceeding does not involve the title of the respondent, but merely shows to the court, as it is entitled to know, whether an adverse claim exists; whether the property is assets of the estate; or whether there must be a

separate and independent suit to determine that proposition. The rule is only what the respondent chooses to make it. If he shows adverse claim, color of title, title or ownership, there is nothing to do but let him go; and then the trustee may bring a plenary suit. But if the respondent shows nothing, except that he questions the jurisdiction of the court to issue the rule, that jurisdiction is complete, and the order to turn over ought to go.

Such a construction of the law as the Court of Appeals has given would lead to many useless suits, incurring thousands of dollars of expense without accomplishing any good results, and would entail great and unnecessary delay in the gathering in of the bankrupt's estate; all when equity moves directly and avoids a multiplicity of suits.

The evils of such a rule are clearly stated by Judge Jackson, of the West Virginia District, in the case of *in re* Moore, 104 Fed. 869, and the facts and reasoning are so in consonance with our ideas of the case at bar; the opinion being short, we take the liberty of quoting it in full:

> "The certificate of the referee, and the report of the trustee of the above bankrupt, which have been certified to the District Judge, show that the bankrupt, just prior to the filing of the petition herein, turned over to his wife certain moneys and properties amounting to $300 in value, which properties she now refuses to turn over to the trustee, although admitting the receipt. The wife of said bankrupt has made no claim of ownership of said property, but simply claims, according to the record now before me, that she is advised by her counsel not to deliver possession thereof to said trustee unless ordered by court. While title to property or moneys claimed by the trustee to belong to the bankrupt are not ordinarily to be tried by the District Court, and the claims of ownership of adverse claimants summarily be passed upon and determined by this court, yet the ownership not being contested, the trustee should not be driven to his action

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to obtain possession of property of the bankrupt, simply because such property is in the possession or custody of another not claiming ownership thereof. Were this the case, the trustee might be compelled to institute suit for every separate item of the bankrupt's estate not in the personal, physical possession of the bankrupt at the date of the adjudication; and the malice, caprice or whim of the bankrupt, or the various parties who chanced to have physical control of portions of the bankrupt's estate at that date, could on any pretext, or without pretext, nullify the entire purpose of the act. Fortunately, the bankruptcy act is not subject to such an absurdity. As soon as the trustee is appointed and qualified he is vested with the title to the bankrupt's property. The vesting of the title gives him constructive possession of the property the instant the title passes. Such property is thereby brought into the bankruptcy court and placed in its custody and under its protection as fully as if in the visible presence of the court. Being in the custody of the bankruptcy court, to interfere with or withhold it is contempt of such court, and may be punishable as such. Section 21*e* provides that a certified copy of the order approving the bond of the trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and is sufficient to authorize and require all custodians of such property, wherever situated, to deliver it to such trustee. Section 70, Subd. 5, provides that the trustee shall be vested by operation of law with the title of the bankrupt to 'all property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.' Upon the facts of this case an order should be entered requiring Mrs. Moore to forthwith turn over to the trustee all property of the bankrupt of every description in her possession, and a failure to comply therewith would, upon proper proceedings had thereon, constitute a contempt of this court."

In the case of *in re* Green, 108 Fed. 616, Judge McPherson released the wives of the bankrupts, but it was

because the money held by them had been paid them by the bankrupts in satisfaction of debts alleged to be owing them, and they therefore held it as a matter of right, and adversely. No such state of facts exists here.

The Circuit Court of Appeals for the Ninth Circuit, *in re* Francis-Valentine Co., 94 Fed. 793, has decided that the court may summarily require a sheriff to deliver to the trustee the possession of a bankrupt's property seized within four months prior to the proceedings in bankruptcy; and in that case the court, commenting on Marshall vs. Knox, 16 Wall. 551, used this language:

> "In that case a lessor of the bankrupt had caused the sheriff, under a writ of provisional seizure, to take possession of certain property of the bankrupt, which the lessor claimed the right to hold as a pledge for the payment of rent which was due him. It was held that the District Court sitting in bankruptcy had no jurisdiction to proceed by rule to take the goods from the possession of the sheriff. The court, referring to the seizure of the goods, said: 'The landlord claimed the right thus to hold possession of them until his rent was satisfied. This claim was adverse to that of the assignee.' These words quoted from the opinion fully explain the ground of the decision. It was because the claim was adverse to that of the assignee. In the present case the sheriff had possession, not in opposition to the right of the bankrupt nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt."

The court will observe that the analogy between the Valentine case and the case at bar is complete, for it is established by facts binding upon the Court of Appeals that W. T. Nugent received this money as custodian only; that the capacity of custodian was never changed, and that he was asserting no adverse claim or title thereto; but, in the

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words of the Court of Appeals for the Ninth Circuit, Nugent "had possession, not in opposition to the right of the bankrupt, nor in opposition to his title, but his possession was based entirely upon the assumption that the title was in the bankrupt."

The practice under the present law of taking the assets from the custodian by rule has also been followed, *in re* Brooks, 91 Fed. 508; Judge Wheeler, by a rule, compelled a purchaser, under purchase made after the filing of the petition in bankruptcy, to turn over the property to the trustee, even though the sheriff, who made the sale, had already levied upon the property prior to the proceedings in bankruptcy. See also *in re* Stokes, 106 Fed. 312.

Again, it was decided *in re* Rosser, 101 Fed. 562, by the Circuit Court of Appeals for the Eighth Circuit, that—

> "The effect of an adjudication in bankruptcy is to place all the property of the bankrupt, not exempt by law, in the custody of the District Court, and to charge the bankrupt and all other persons who have the possession or control of any of it, as trustees for the court and for the trustee in bankruptcy who is subsequently appointed."

The learned counsel for respondent strenuously contended in the argument below and on the petition for *certiorari* that this case fell within the principles of the Bardes decision. It was his idea that the delivery of possession to the respondent constituted at best only a fraudulent transfer to a third person claiming the property as his own.

That, however, was also *before* the delivery of the opinion in the Bernheimer case.

There never was at any time any claim to adverse interest or a transfer within the meaning of the statute or the Bardes

case until after the finding and order of the district judge on review. It was at that time that the attempt was made to oust the court of its jurisdiction by offering the amended response, the filing of which the judge refused to order.

And, based on that irrelevant matter, the burden of the response and counsel's argument is that the referee had no right to go to the length he did; that he and the court were without jurisdiction; that the trustee must be relegated to a plenary suit in the State court, with the slow and uncertain processes therein; that this summary method was unauthorized by the law. We may reach the contention in a way other than through the decisions based on the present law.

This court in White vs. Ewing, 159 U. S. 36, said:

> "In this case, however, the court proceeds upon its own authority to collect the assets of an estate, with the administration of which it is charged; and if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation over which it has by an original bill obtained jurisdiction. In this particular the jurisdiction of the circuit court does not materially differ from that of the district court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted." Ryan vs. Kingsbury, 88 Ga. 361.

One of the reasons for that similarity is that the receiver of a court and the trustee in bankruptcy are in exactly similar positions. True, the one takes his power from the order, the other from the statute; yet both are officers—arms of the court. (Secs. 2 (18) and 33.) And the administration of the estates in the hands of the two officers are in all respects identical—that is, under the law. Except with respect to receiverships for special purposes, both take all the property

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of the debtor; and the remedies for one are the remedies for the other. If then the law allows to receivers summary process against third persons with respect to the debtor's property, it also allows the same process to trustees in bankruptcy.

And the law does allow this fiduciary the summary process invoked in this case.

> "The receiver being the officer or agent of the court is entitled to its assistance in obtaining possession of property which is the subject-matter of his receivership and may have an order of court to procure possession of such property not only against defendant in the action but in a proper case against his agents and employes, although not parties to the record requiring them to deliver up the specific property.
>
> "Such procedure does not conflict with the principle that no man shall be deprived of his property without due process of law, since the surrender to the receiver does not affect the ultimate question of the right to the property any more than does the levy of an attachment; the purpose being merely to secure the property by getting it into the receiver's possession, so that it may be safely delivered to the party who shall be finally determined to be entitled thereto.
>
> "And the order for the surrender of the property to the receiver may, if necessary, be enforced by process of attachment."

High on Receivers, 3d Ed., Sec. 144, citing *in re* Cohen, 5 Cal. 494. Geisse vs. Beall, 5 Wis. 224. Green vs. Green 2 Sim. 430. Miller vs. Jones, 39 Ill. 54.

Smith on Receiverships, pp. 64 and 122, citing *re* Cohen, 5 Cal. 494. Ryan vs. Kingsbury, 88 Ga. 361. Geisse vs. Beall, 5 Wis. 224. American Const. Co. vs. Jacksonville T. & K. W. R. Co., 52 Fed. 937. Green vs. Green, 2 Sim. 430. Miller vs. Jones, 39 Ill. 54. Brandt vs. Allen, 76 Iowa, 50.

Griffiths vs. Griffiths, 2 Ves. Jr. 400. People vs. Rogers, 2 Paige, 103.

"The court will, moreover, oblige the attorney of a defendant to render an account and inventory, under oath, of all trust funds belonging to the defendant which may have come into his hands, and to deliver them over to its receiver. The same rule applies to agents and employes of the defendant, even though they are not parties to the record. The surrender of the property to a receiver under order of the court is enforceable by attachment process." Beach on Receivers. (Alderson's Ed.) Sec. 244 citing same cases. See Ryan vs. Kingsbury, 88 Ga. 361.

"Courts of equity unquestionably have the power to appoint receivers and to order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agent, and in proper cases they can also order the defendant's agents or employes, although not parties to the record, to deliver the specific property to the receiver.

"This power does not conflict with the provisions of the law which provides that no man shall be deprived of his property without due process of law." *In re* Cohen, &c., 5 Cal. 494.

"The practice of requiring the surrender of property to the receiver by summary motion or petition is well recognized where it is held by the attorneys, agents and employes of the defendant. Beach, Rec. 230. The same practice seems not improper where the property in question is held by a defendant in the motion, not for himself but as trustee, and so, in a sense, as the agent for those interested in the assets, including the defendant in the case. In modern litigation in equity a defendant's property may be in the possession of hundreds of agents and bailees, holding under various agreements, and it is not reasonable that a receiver appointed of all the assets should be required to sue each bailee and agent separately or that all should

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be made parties to the main suit should they merely refuse to surrender the assets."

"This summary proceeding is not opposed to the constitutional provision that no one shall be deprived of his property without due course of law, because the receiver does not become vested with any beneficial title to the property."

Miles vs. New South B. & L. Ass'n., 95 Fed. 919.

Brandt vs. Allen, 40 N. W. 82.

Beach Receivers, 209.

Bibber White Co. vs. White River Valley Electric Co., 107 Fed. 177, citing *ex parte* Tyler, 149 U. S. 164.

The Court of Appeals at the close of its opinion (R. 48) says:

> "Our conclusion that these proceedings are invalid for lack of sufficient authority from the law also makes it unnecessary to consider whether, if such authority existed, the petition to the referee for the order to show cause was sufficient to found the proceedings against the respondent, and whether the proceedings taken thereon were regular or otherwise."

It is true that that petition is not as specific as it might now be made; but when the respondent came to read it, he saw that the trustee was seeking the fund realized from the sale of the stock, and that the prayer of the petition not only sought an injunction against him, restraining him from disposing of the fund, but sought an order directing him to deliver it to the trustee.

As to the sufficiency of the petition, he was satisfied, for he filed no demurrer to test it. If the court had jurisdiction to entertain a petition at all, then it was the duty of respondent to test its sufficiency in a proper way before the rule was

made absolute and the entry of the subsequent orders by the referee.

The fact was that the trustee did not know whether the father or the son had the money, and the desire of the trustee was to get it; the effect of the allegation was that respondent had it; the true facts were within his knowledge; the prayer was directed against him, and if he did not have it he could easily have said so; and we submit, since, as was said in White vs. Schloerb, the question concerns not the trial of the title to these goods, but only the judicial custody and lawful possession of them; since, as was said in White vs. Ewing, the trustee is a party merely because he represents the court in its inherent power to wind up the estate of an insolvent over which it has by an original bill obtained jurisdiction, a mere petition, or perhaps a mere affidavit and motion without the formalities of a bill, would be sufficient to establish a basis for rule. The court, as the record discloses, had already tried to obtain the fund from the bankrupt (see petition R. 13 and Judge Evans' opinion R. 38); it was in reality familiar with the facts, and we question very much whether the court of its own motion, after hearing the proof, and knowing the facts as it did on the effort against the bankrupt, might not have entered the show cause order against the son and agent without further ado. We therefore feel constrained to say that, had the Court of Appeals deemed it necessary to consider the petition, it would have held it sufficient, the more especially since the court was familiar with the facts and respondent did not complain.

Under Section 70 of the Bankrupt Act the property of the bankrupt, including his *money*, passes to the trustee in

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bankruptcy. This includes all money and property in his hands as well as all money and property in the hands of his agents, bailees or trustees, for the possession of the agent, bailee or trustee is the possession of the principal. It may be said that these fiduciaries may have some claim against the property, and if true, those claims probably ought to be settled before the property is taken from their possession. But when called upon they must assert and set up those claims.

Speaking to the power of the court in bankruptcy to order the bankrupt and all other persons to deliver over the money or property of the bankrupt, the Eighth Circuit Court of Appeals, in an opinion by Judge Sanborn *in re* Rosser, 101 Fed. 562, said :

> "Two essential facts limit this power and condition its lawful exercise. They are that the money or property directed to be delivered to the trustee or other officer of the court is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time that the order of delivery is made."

And in the last paragraph of the Bernheimer case this court directed that the lower court bring Davidson, the trustee, the agent, into the case under Sec. 2 (6) of the act, so that full justice could be done Bernheimer concerning the *money* held by Davidson.

See also Pirie vs. Chicago Title & Trust Co. decided by this court May 27, 1901, as to transfers of money.

In the very interesting case of Wasson vs. Hawkins, 59 Fed. 233, supported by various authorities of this and other courts, a demurrer to a bill seeking the recovery of money deposited with a failing bank within a few hours of its

failure was overruled. The analogy between that case and this one is striking. The deposit there was with a bank, here with an individual; both, however, were mere custodians, and both holding the money coming into its possession only a few hours before the failure. Judge Baker in his opinion in that case said:

> "The true distinction, therefore, between money, banknotes, or negotiable bills, and other chattels, would seem to be that the former, for the protection of commerce, can not be followed into the hands of a *bona fide* holder to whom they have passed in due course of business, while other chattels affected by a trust may, in general, be pursued and reclaimed. The ancient notion that money could not be followed, even as between trustee and *cestui que* trust, because money had no earmark, has given way to a more just and enlightened doctrine. Money, banknotes, and negotiable bills may be followed by the rightful owner, where they have not been circulated or negotiated, or if the person to whom they have passed has express notice of the trust. Miller vs. Race, 1 Burrows, 452; 1 Smith, Lead. Cas. (5th Amer. Ed.) 597 (250); Taylor vs. Plumer, 3 Maule & S. 562, 575; King vs. Egginton, 1 Term R. 370; Ryall vs. Rolle, 1 Atk. 172; Pennell vs. Deffell, 4 De Gex, M. & G. 372; *in re* Hallett's Estate, 36 Eng. R. 779, 13 Ch. Div. 696; National Bank vs. Insurance Co., 104 U. S. 54.
>
> "The only difference between money and notes and bills is that money is not earmarked, and therefore can not be traced except under particular circumstances, while bills and notes, having a number and date, may generally be identified with less difficulty. It is conceded that if plaintiff could identify the particular coins and banknotes which he had deposited, he would have the right to withdraw them from the mass of coins and banknotes which passed into the hands of the receiver; but it is insisted that, inasmuch as the money deposited by him has, like water, flowed into the common mass, and so become incapable of identification, the right to pursue and reclaim it is lost, although it is admitted that the

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very coins and banknotes deposited by him constitute a part of the common mass. It is charged in the bill and admitted by the demurrer that the identical coins and banknotes deposited by the plaintiff remained in the bank when it stopped business, and came into the hands of the receiver, who now has them in his possession as a part of the general mass of coins and notes held by him as such receiver. In such a case the identification is sufficient to entitle the depositor to follow and reclaim the deposit made by him. Although the identical coins and banknotes can not be ascertained, yet, as it is admitted that so much in coins and banknotes belonging to the plaintiff is in the common mass, he is entitled, in equity and good conscience, to take so much out. If he does not withdraw from the common mass the very coins and banknotes deposited by himself, no injustice is done, for he leaves an equitable amount of his own in place of every coin or banknote deposited by another." Pennell vs. Deffell, 4 De Gex, M. & G. 372; *in re* Hallet's Estate, 36 Eng. R. 779, 13 Ch. Div. 696; Cragie vs. Hadley, 99 N. Y. 131, 1 N. E. 537; National Bank vs. Insurance Co., 104 U. S. 54; Frelinghuysen vs. Nugent, 36 Fed. 229; Peters vs. Bain, 133 U. S. 670, 10 Sup. Ct. 354; Bank vs. Dowd, 38 Fed. 172; Atkinson vs. Printing Co., 114 N. Y. 168, 21 N. E. 178; *in re* North River Bank (Sup.), 14 N. Y. Sup. 261.

In this case proof has been taken; a hearing has been had and the facts found to be that respondent has this money, without beneficial claim in himself; and that the money belongs to the bankrupt estate. We are not trying a disputed title in a court of law. We are in a court of equity; and equity goes directly to the meat of the matter; and, having jurisdiction of all the property of the debtor, whether it be in his hands, in the hands of his bank, his trust company, his clerk, agent or bailee, will order that they show cause why they shall not turn over the property, including money held on deposit or

otherwise; and if good cause be not shown, the order to turn over will be entered. Why not? If the respondent deserves trial by jury, let him question the title in a proper way. If he has n't the money, let him show it. If there be aught to say why he should not deliver, let him say it. Let him not, laughing in his sleeve, sit back and say: "'*Custodia legis*,' 'possession of the court,' 'arm of the court,' 'possession of the agent is possession of the principal,' are high-sounding phrases, but they are meaningless to me; sue me and if I lose in the suit I'll not on the execution."

How could there be conceived a greater trifling with the court? How can we patiently stop to show authority to act?

The very thought of respondent's boldness makes patience cease as a virtue. The court, with its finely drawn sense of justice, should say to respondent: "You show no claim. We have the power. Deliver."

If the Court should conclude to reverse the case, we ask that its opinion direct that the order of commitment be reinstated, or that the lower court be directed to issue a capias, or such other process as may be proper and necessary, by which respondent may be committed until he complies with the order of the referee entered October 16, A. D. 1900.

Respectfully submitted.

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JOHN RICHARD WATTS,
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No. 257.
Supp. Brf. of Watts for Petitioner

Office Supreme Court U. S.
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Clerk

Filed Nov. 15, 1901.

# Supreme Court of the United States.

**OCTOBER TERM, 1901.**

*No. 257.*

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, PETITIONER,

*vs.*

WILLIAM T. NUGENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

**SUPPLEMENTAL BRIEF FOR ARTHUR E. MUELLER, TRUSTEE, FILED UNDER LEAVE OF COURT.**

WILLIAM W. WATTS,
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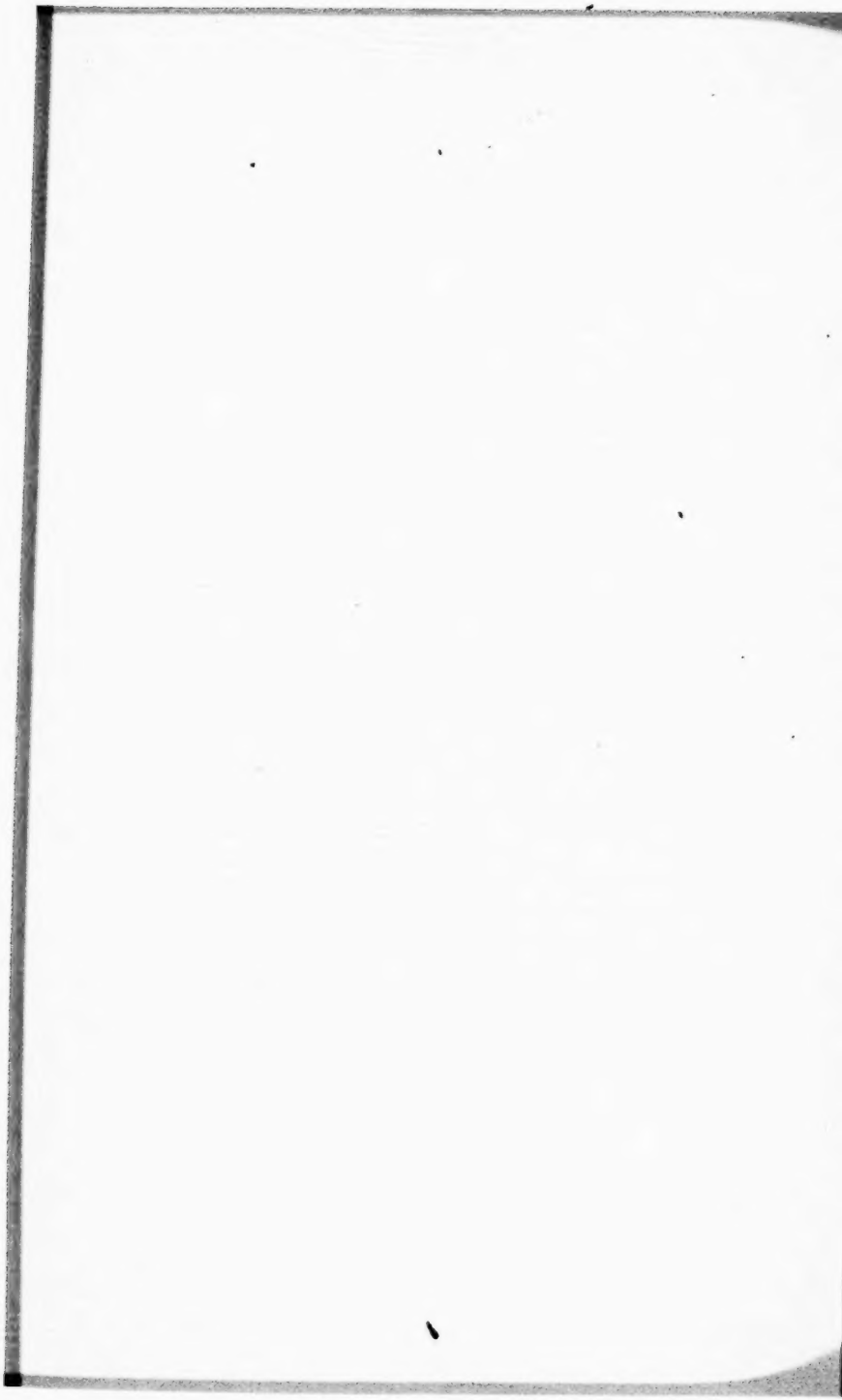

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28752

# Supreme Court of the United States

**OCTOBER TERM, 1901.**

*No. 257.*

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, PETITIONER,

*vs.*

WILLIAM T. NUGENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## Supplemental Brief for Arthur E. Mueller, Trustee, Filed under Leave of Court.

As stated on the argument, counsel for respondent, by reason of a reprint of the brief used by him in the Circuit Court of Appeals, makes two propositions which we believe he would have withdrawn had he been present at the argument.

The one proposition is the motion for bail. That question is dead, for the reason that respondent was released

from jail upon the decision of the Circuit Court of Appeals, and, being no longer in custody, there can be no such motion.

The other point is that the writ should run in the name of the Government instead in the style of the cause.

That question was never raised before the district judge, and that judge had no chance to pass on it.

It has not been fairly presented to and acted upon by the court below. It was the right or duty of the respondent to first make his objection to the order committing him, or that any process or order should run in the name of the Government, before the judge of the district court below, just as much as it was his right or duty to make the point of jurisdiction or any other question in the case for review. This is a revisory or appellate court and has no original jurisdiction.

If the Government is interested, it has had no notice of this petition for review as required by the act (sec. 24*b*).

This is not a *habeas corpus* case, but a review of orders made in a civil suit in equity under the provisions of the bankruptcy act.

Goldman *vs.* Smith, 93 Fed., 182.

The respondent is made a party to the suit under subsection 7, section 2 of the bankrupt act, for the purpose of determining controversies in relation to the estate; and, after due notice and hearing and an opportunity given him for response or defense, he is ordered to turn over the assets belonging to the estate, and is detained until he complies with that order.

If the court will examine the Purvine case, 96 Fed., 192,

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decided by the Fifth Circuit Court of Appeals, it will be seen that the proceedings and the order are like those followed and entered there.

In all the cases cited by counsel for Nugent the questions arising were those where a punishment was inflicted on the defendant for some offense committed against the court and in which the penalties went to the Government, or in patent cases, in which this court well knows the practice is to inflict punishment in the way of a fine for the benefit of the plaintiff.

It may be true, though we do not even admit that, that an attachment issuing upon the making of a rule absolute ought to run in the name of the people or of the Government of the United States, but there was no attachment in this case to run in the name of the people or otherwise. The respondent was made a party to the suit. He was proceeded against under the express provisions of the bankrupt law, and he was not punished in the sense of being fined or imprisoned, but was detained until he complied with a lawful order. After being made a party to the suit, and after due notice and hearing of the matters set up against him, and proof taken thereon, he was ordered to pay, and detained until he did turn over the funds.

There being no attachment in this case for the taking of the body of the respondent, and no necessity for one, then as to what complaint can be made that some paper does not run in the name of the Government, we do not understand.

> "In proceedings in equity between parties to a suit for contempt in not obeying the process of the court, or any order or decree in the cause, the proceedings

on the attachment may be, and usually are, entitled as in the original suit, though it is not irregular to entitle them in the name of The People, on the relation of the person prosecuting the attachment against the defendant or party proceeded against. Where the attachment proceeding for a contempt is against a witness, or a person not a party to the suit, the practice is to entitle the order for attachment, and all subsequent proceedings thereon, in the name of The People, on the relation, etc.

* * * * * * *

"If such an order is void, the prisoner may be discharged on *habeas corpus*, but not for irregularities, when the court had jurisdiction to grant the order.

* * * * * * *

"An attachment is a writ directed to the marshal of the court, sealed and bearing *teste* in the same manner as a writ of subpœna, directing him to attach the body of the person named therein, and to safely keep the same, so that he can produce the person or persons thus attached in court at a certain day termed the return day of the writ, or until the further order of the court."

Foster's Federal Practice, second edition, pages 654–'5–'6, and cases cited.

Even if there had been such a form of paper, and there had been such an irregularity for it is but an irregularity, the court would not discharge the prisoner, but, if the irregularity was of sufficient importance, would send the case back for the purpose of conforming to the law.

The case of the United States *vs.* Wayne, Federal Cases, 16654, relied upon by counsel for Nugent, does not at all apply to the case at bar. There a party to a suit made a

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publication in a newspaper reflecting upon the judge; that was a criminal contempt, and had absolutely nothing to do with the case on trial.

If that case is to be relied upon, it will further be noted that the objection that the writ was made in the name of the case rather than in the name of the United States was made below, just as we contend it ought to have been made here, and further that the court said:

> "The law is, and so is the practice and reason of the thing, that proceedings against a party or some third person for a supposed contempt in the course of the cause must be entitled as in the civil cause, for until the rule is made absolute and an attachment is issued there is no suit between the United States and the person charged with a contempt."

This is not a proceeding against a contumacious witness, nor a person not a party to a suit, nor one who has been guilty of a criminal or direct contempt, as in the case above last quoted, or as is shown in all the cases cited by counsel. It is but the enforcement of an order in a civil equity proceeding, acting as equity does *in personam* for the enforcement of a lawful order specifically provided by the bankruptcy law. It is not imprisonment for the mulcting or imprisoning the debtor under section 725 of the Revised Statutes, but the detention of that person until he complies with the order. We have on review an interlocutory order of the judge based on an order *nisi* made by the referee.

While it may be true that the judge had the power to fine and imprison as for contempt, it is also true that he did not do so, further than to detain Nugent until he complied with the lawful order.

We commend to the court, as a matter of interest in the manner in which courts with five judges may render decisions which may not be understood, the case of "In the matter of Bronson *vs.* Mitchell, 12 Johnson, 460," cited in counsel's brief.

We wish the court, in reading our original brief, would note, on page 13 thereof, section 41 of the bankrupt act of 1898, and general order of this court number 23, both concerning referees. That section and order were omitted from our brief.

Respectfully submitted.

WILLIAM W. WATTS,
*Counsel for the Trustee.*

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No. 576. 257.
Brf. of Lane for Respondent

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# In the Supreme Court of the United States.

576

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY
OF EDWARD B. NUGENT, BANKRUPT, . . . Petitioner,

vs.

WILLIAM T. NUGENT, . . . . . Respondent.

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BRIEF OF H. M. LANE and W. M. SMITH FOR W. T. NUGENT, ON MOTION BY PETITIONER FOR CERTIORARI.

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# In the Supreme Court of the United States.

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, . . *Petitioner*,

vs.

WILLIAM T. NUGENT, . . . . . *Respondent.*

**BRIEF FOR W. T. NUGENT ON MOTION BY PETITIONER FOR CERTIORARI.**

On February 19, 1900, at five o'clock p. m., the Wayne Knitting Mills, Belding Brothers & Company and the German Insurance Bank filed a petition in the District Court of the United States against E. B. Nugent, seeking to have him adjudged a bankrupt. Upon this petition adjudication was had, and the case duly referred to the referee and trustee appointed; and said E. B. Nugent, the bankrupt, was ruled herein, before the referee, to pay to the trustee $14,435.95, money in his possession, custody and control. He answered, and his answer was held insufficient, and he ordered to pay, and failing to do so, said referee certified the fact to the Court with recommendation that he be punished for contempt. The Court upon hearing sustained the order to pay, but upon the suggestion that owing to the condition of his mind said Nugent was not a fit subject for punishment, the Court gave a hearing and discharged him. W. T. Nugent was not a party to this suit.

On the 13th day of April, 1900, the trustee filed a petition before the referee for and obtained an injunction thereon, restraining W. T. Nugent from disposing of said money and requiring him to show cause, within five days after the service of the summons on him, why he should not be required to pay said money to the trustee. This injunction was granted and the order made, upon the allegation of said petition, and without notice to W. T. Nugent.

In the meantime an indictment was returned against W. T. Nugent in the United States District Court, containing three counts—charging him with the offense of receiving this $14,435.95 of the assets of E. B. Nugent after the filing of the petition in bankruptcy against said E. B. Nugent, to defeat the Act of bankruptcy, and, in another count, with retaining and aiding and abetting in the retention of same, both after the filing of said petition and the adjudication.

W. T. Nugent was arrested on said indictment and placed in jail. Then said injunction and order issued upon the petition filed before said referee in favor of the trustee against him, were served on him—and he was then brought from jail before said referee for examination and response. He thereupon filed his response, which is as follows:

"Defendant, W. T. Nugent, for response to the order made herein on April 13, 1900, requiring him to pay $14,435.95 to the trustee herein, says that as shown by the pleadings, records and the evidence in this case taken, and the entire proceedings had herein, neither the Court or the referee in bankruptcy herein has any jurisdiction either of this respondent or the matter involved to make any such order, or to require this respondent to answer thereto, because he says that said records herein show

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that if respondent received said money, or any part thereof, it was before the petition in bankruptcy was filed, and in that event neither the Court or the referee in bankruptcy can proceed against this respondent, as herein attempted by order or rule to pay, and he now hereby asks that this be taken as his response herein and that said order be set aside and vacated. He says that at no time since the filing of the petition in bankruptcy herein has he received said $14,435.95 or any part thereof."

"Defendant for further response herein says that he ought not to be required to respond as to the matters herein set forth or any of them, because he says that within the last few days he has been indicted in the District Court of the United States for the District of Kentucky, sitting at Louisville, charged with the offense of receiving said $14,435.95 after the filing of the petition in bankruptcy against E. B. Nugent, and also with retaining same and aiding and abetting in the retention thereof, both after the filing of said petition and the adjudging of said Nugent a bankrupt therunder, for the purpose of defeating the bankrupt law. He says that said indictment is still pending undetermined, and his response herein in regard to these matters would tend to criminate him thereunder. He says that this indictment grew out of the transactions upon which this litigation is based, and said indictment is based upon the identical transactions that he is now called upon to respond in reference thereto, and that he is now in jail under said charge awaiting trial, and to compel him to respond herein would deprive him of the constitutional right guaranteed to him by the Constitution, that is, that he shall not be compelled to give evidence as against himself.

"And now having fully responded herein, he prays that the order herein be set aside and vacated and that he be dismissed from further response thereto."

The referee held that said Nugent could not be examined touching any of the matters that might tend to criminate him under said indictment, but adjudged his response insufficient, and respondent then filed his petition for review, and the referee certified said matter to the Court—and stated as his finding *that said Nugent received all said money before the petition in bankruptcy was filed*, but that he received same as agent of his father to pay debts, and recommended that he be punished for contempt.

The District Court rendered an opinion on said review, which is filed with the record, sustaining said referee—but before sentence or judgment was rendered thereon, respondent offered the following amended response, which the Court refused to permit to be filed, to-wit:

"UNITED STATES DISTRICT COURT.

DISTRICT OF KENTUCKY.

WAYNE KNITTING MILLS, ET AL.

vs. AMENDED RESPONSE.

E. B. NUGENT, BANKRUPT.

"Defendant, W. T. Nugent, by way of amended response herein, files herewith a copy of the indictment against him referred to in his original response, and marks same "W. T. N.," and files same as an exhibit herein, and as part of this response. He says that while it is true that the referee held his response herein as insufficient, he says that it is further true that said referee stated and held, at the time, that he could not be required to respond herein as to matters that had a tendency to incriminate him under said indictment,

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and refused to permit him to be examined by said trustee as to any matters or transactions directly or indirectly relating to the transactions involved in said indictment. Respondent says that, believing as he did and being advised that he could not be legally required to respond to any such transaction, and by reason of said ruling of the referee, he did not make his full response as to the entire facts.

"He now asks to amend said response, and states that he has not the $14,233.45 or any part thereof now in his possession or under his control, and did not have same in his possession or under his control at the time the process was served on him herein on October 8, 1900, nor did he have any notice of any injunction herein until said service. He says that neither at the time of the filing of the petition in bankruptcy herein against E. B. Nugent, or at any time subsequent thereto, did he have in his hands any amount of money belonging to said Nugent which he held as his agent or bailee. He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent, or any such money at any subsequent date thereto, was not received or held by this respondent as agent or bailee or in any trust capacity whatever, but was held adversely to said E. B. Nugent.

"And he prays as in his original response."

And the Court thereupon rendered the following judgment and sentence, to-wit:

"Came William T. Nugent, respondent herein, and tendered an amended response and moved to file same, and the Court, not having postponed the imposing of the sentence for

that purpose, and being of opinion that it was not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the Court, declined at this stage of the procedings to permit a further response to be filed.

"And thereupon, pursuant to the opinion of the Court filed herein on the 1st instant, it is the judgment of the Court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson County, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.45 or otherwise satisfy the said trustee with respect thereto, and the Court reserves the right and power to suspend or set aside this judgment and sentence upon the delivery, payment or satisfaction aforesaid."

"To all of which the respondent, William T. Nugent, excepts."

And to review said proceedings, orders, sentence and judgment, said W. T. Nugent filed his petition for review in the Circuit Court of Appeals, stating that he was confined in jail under said sentence—and entered a motion for bail and release during the pendency of said proceedings, conditioned for his appearance thereto. The petition for review is under Sub-section "b" of Section 24 of the Bankrupt Act of 1898, which provides:

> "The several Circuit Courts of Appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law, the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

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## POINTS OF LAW STATED IN THE PETITION FOR REVIEW FILED IN THE CIRCUIT COURT OF APPEALS.

*First:* That neither the referee or the Court has the right or jurisdiction to proceed in the summary way had, against a third party to whom property had been transferred before the filing of the petition in bankruptcy.

*Second:* That the referee had no right or jurisdiction of the petition filed before him by the trustee against W. T. Nugent, or to make any order or grant the injunction thereon.

*Third:* That the Court and referee erred in holding the response filed before the referee insufficient.

*Fourth:* That the Court erred in refusing to permit the amended response to be filed.

*Fifth:* That the Court erred in sentencing W. T. Nugent to be imprisoned for an indefinite length of time or until he pay said money to the trustee.

*Sixth:* That the order and sentence thereunder are erroneous and void, because they do not run in the name of the Government.

*Seventh:* That as against W. T. Nugent, under the findings, in no event can the failure to pay be more than a *civil contempt*, if that, and that, as such, same is subject to review under Sub-section "b" of Section 24 of the Bankrupt Act of 1898; and that pending said review, said Nugent is entitled to be released on bond, conditioned for his personal appearance.

## ARGUMENT.

As to the first proposition—

The right to proceed in this summary way against a party to whom property had been transferred before the filing of the petition in bankruptcy.

It is held by both the referee and the Court that W. T. Nugent received the money he is ordered to pay *before the filing of the petition in bankruptcy.*

By Sub-section "b" of Section 23 of the Bankrupt Act it is provided:

> "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, *unless by consent of the proposed defendant.*"

The response of W. T. Nugent, filed before the referee, *does not consent to the jurisdiction*, but, upon the contrary, pleads specially thereto, and this was respondent's first appearance in these proceedings.

The first part of Section 23 of said Act provides:

> "The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

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That is, that diverse citizenship and the requisite amount must exist and be involved to give the United States Circuit Court jurisdiction in suits between trustees and adverse claimants.

And Sub-section "b" of said Section 23 provides that such suits, not embraced by the first part of said section, that is, where there is no diverse citizenship, etc., must be brought where the bankrupt, had not such bankrupt proceedings been instituted, could have brought and prosecuted them, *unless by consent of the proposed defendant.*

This clause concerns the jurisdiction only, and not the merits of the case; the form in which the case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. Whenever it is shown by the pleadings and the findings of the referee, as in this case, that "*the proposed defendant*" received the money sought to be recoved from him *before the filing of the petition in bankruptcy*, then the trustee's only remedy is his action under Section 23—for, to obtain jurisdiction otherwise, as a condition precedent, the "*proposed*" defendant must *consent* thereto, and as he did not *consent* in this case, but resisted, at all times, such jurisdiction, neither the referee or Court had the right to require him to respond and say how he held or claimed this money, or what disposition he had made of it. The Court must first obtain jurisdiction of him before he can be made to respond, or failing to respond, before the Court can take action against him.

By Section 41 of the Bankrupt Act it is provided: "A person shall not, in proceedings before a referee, disobey or resist any lawful order, process or writ," and the section

further provides that in case of such disobedience the matter shall be certified to the Court where punishment may be inflicted upon him the same as if the offense had been committed before the Court.

Sub-section 13 of Section 2 of said Act gives to the Court authority to "enforce obedience by bankrupts, officers and other persons to all lawful orders by fine or imprisonment or fine and imprisonment."

It seems perfectly clear, in view of Section 23, that the "*other persons*" referred to in this Sub-section 13 of Section 2, are only such persons as the Court has obtained jurisdiction of or such as interfere in said proceedings or obtain the assets after the filing of the petition in bankruptcy, or the adjudication thereon.

Section 29 refers only to offenses punishable by indictment; so the twenty-third section must govern in this case.

It will be seen that the important facts determined by the District Court, in its opinion rendered on said petition for review, are:

1st. That W. T. Nugent received all the money he is now ordered to pay before the filing of the petition in bankruptcy.

2d. That he held same in his hands at the time of filing the petition in bankruptcy, on February 19, 1900, and also at the time of the adjudication, on March 23, 1900, as custodian and agent of his father, E. B. Nugent, the bankrupt. That said money is the property of the bankrupt's estate. That W. T. Nugent never claimed same adversely to the bankrupt or trustee, or claimed to have converted same to his own use.

3d. That E. B. Nugent, the bankrupt, was ruled to pay said money into Court and responded that same was in the hands of his son, and that he had gone, he knew not whither,

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and that it was impossible for him to pay same. The referee held the response insufficient and ordered him to pay, and he failing, recommended that he be punished for contempt, and pending the matter, upon suggestion, the Court discharged him on account of age.

4th. That for several months W. T. Nugent remained in hiding, but in October, 1900, was found and indicted for receiving and concealing assets of the bankrupt. That on April 13, 1900, on the petition of the trustee, W. T. Nugent was enjoined from disposing of said money, and ordered to show cause, within five days from service of said order, why he should not be required to pay the money to said trustee. That said order was served October 8, 1900, and on October 13th he filed his response which the referee adjudged insufficient, and failing to respond further was ordered to pay, and not complying was held in contempt and sentenced.

The findings of the facts by the referee are similar to those of the Court, except *the referee does not find that this money was in the hands of W. T. Nugent at the time of the filing of the petition or the adjudication thereon, nor does he find that W. T. Nugent did not hold same adversely.* He does find, however, that he received the money as agent and has not accounted therefor, and only this.

The Court's attention is specially called to the following quotation from the opinion, found on pages 32 and 33 of the record :

> "Upon a hearing thereof the referee adjudged that the response was insufficient and no further response was tendered. Whereupon the rule was made absolute, and on October 16th the respondent was ordered to pay the trustee at 9:30 o'clock a. m., of the next day, the sum

of $14,233.45, being the amount in his hands in the manner stated and belonging to the bankrupt's estate. The respondent having failed to obey this order, or to pay any part of the money, the referee adjudged him to be in contempt, and recommended that the Court impose a punishment therefor. The Court finds the facts of the case to be as above stated, *with the addition that the entire amount, $14,233.45, is the property of the bankrupt's estate alone; that it had been taken possession of, and was held by W. T. Nugent as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim of right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in anywise to have claimed it adversely to the bankrupt or the trustee.*"

Which conclusively shows that from the fact that the money came to the hands of W. T. Nugent as agent, and as he was given an opportunity under the order issued to respond and say whether he had squandered the money, or whether or not it was transferred him to defraud creditors or to claim it, and failing to avail himself of this privilege, the Court concludes, and finds as facts, *that he had the money both at the time of the filing of the petition and the adjudication thereon, and that the same was not transferred him to defraud creditors, and that he never claimed same and had not squandered it or converted it to his own use.*

That these findings are all deductions drawn by the Court from the fact that he received the money as agent, and refuses to respond anything in regard thereto, to said order,

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is clearly shown by and stated in said opinion; and besides, this must necessarily be true, because the Court finds he took the money and went into hiding and when arrested in October, 1900, refused and still refuses to tell anything about it, and there is not a scintilla of evidence in said case as to said money after it went into the hands of W. T. Nugent; Nugent is the only one that can tell how he held it or what became of it, and the referee refused to compel him to answer in reference thereto, as is shown by his deposition. And besides, a stipulation is filed herein, as part of this record, showing that no evidence was heard, taken or filed either before the referee or the Court as to this money, after Nugent received same, except that he had not paid it to the trustee. Then the sole fact, as found by the referee, upon which this opinion is based is, "*that W. T. Nugent received this money as agent of his father, before the filing of the petition in bankruptcy, and has never accounted to the trustee therefor and refuses to.*"

The additional findings by the Court are simply deductions drawn from the above findings of fact by the referee, and there being no evidence to support same, are mere conclusions of law resulting from facts established, and as such are not binding upon this Court on review, and same is assigned as error in assignment No. VIII, page 7 of record.

It is contended that the holding by W. T. Nugent of this money was not an adverse holding, and therefore not under Section 23.

He is a stranger to the bankrupt proceedings, and to bring him into the case the jurisdictional fact must exist, and that in this case could only be *his consent;* and this consent is not shown to have been given either in the bankrupt pro-

ceedings or to the petition filed before the referee seeking to make him a party.

As to this petition filed before the referee, the filing of same, and the entire proceedings had thereon are absolutely void because said referee had no jurisdiction in said matter.

The powers and duties of the referee are fully defined in Section 38 of the Act, and the only power granted, that petitioner can insist, by any construction, could apply to this case, is given by Section 38, in which the referee is given the right to (3) "exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt *in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district or his sickness or inability to act.*"

It is not a fact, as is shown by the record, and is not contended herein, that any such *certificate* was issued by the Clerk at the time this petition was filed by the trustee before the referee making W. T. Nugent a party to these bankrupt proceedings, or at the time the injunction was issued thereon, or the order made requiring W. T. Nugent to show cause, within five days after service, why he should not pay said money to the trustee.

Then if the authority to file said petition or to make said order thereon is not vested in the referee, he had no right to require W. T. Nugent to respond thereto, or to certify him for contempt for not obeying same, or paying said money over thereunder, because said order was not a "lawful order" or "process," and said entire matter is a void proceeding.

By Section 2 of the Act the *bankrupt courts* are vested with power to (6) "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy."

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But the referee can not exercise this authority in any event until the *certificate of the clerk required* is filed. The court can act in this matter and make new parties only when it is necessary for a complete determination of the matter in controversy. The recovery of this money against W. T. Nugent was not involved in said bankrupt proceedings. There were proceedings had against E. B. Nugent to recover this money, but they had been completed and abandoned, but W. T. Nugent was not even a necessary party to authorize the recovery against E. B. Nugent in these proceedings, but was made a party to said bankrupt proceeding for the sole purpose of compelling *him* to pay.

In Bardes vs. First National Bank of Hawarden, 178 U. S., 524, in construing these sections referred to, and relied on by the Court in its opinion, it is said:

> "*Third.* It includes, among the powers specifically conferred on the courts of bankruptcy, those to (4) 'arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations, for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;' (6) 'bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided;' and (15) 'make such orders, issue such process, and enter such judgments, in addition to those specifically

provided for, as may be necessary for the enforcement of the provisions of this Act.'

"The general provisions at the beginning and end of this section mention 'courts of bankruptcy' and bankruptcy 'proceedings.'

"Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words 'at law,' in the opening sentence conferring on the courts of bankruptcy, 'such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law, and not in equity.'

"The section nowhere mentions civil actions at law, or plenary suits in equity. *And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to bring in and substitute additional parties, 'in proceeding in bankruptcy,' and, in clause 15, to make orders, issue process, and enter judgments 'necessary for the enforcement of the provisions of this Act.'*

"The chief reliance of the appellant is upon clause 7. But this clause, insofar as it speaks of the collection, conversion into money, and distribution of the bankrupt's estate, is no broader than the corresponding provisions of Section 1 of the Act of 1867; and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to 'determine controversies in relation thereto,' it is controlled and limited by the concluding words of the clause, 'except as herein otherwise provided.'

"The words 'herein otherwise provided' evidently refer to Section 23 of the Act, the general scope and

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object of which, as indicated by its title, are to define the 'jurisdiction of United States and State courts' in the premises. The first and second clauses are the only ones relating to civil actions and suits at law or in equity.

"The first clause provides that 'the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy' (thus clearly recognizing the essential difference between proceedings in bankruptcy on the one hand, and suits at law or in equity on the other), 'between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees,' restricting that jurisdiction, however, by the further words, 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.' *This clause, while not relating to the Circuit Courts only, and not to the District Courts of the United States, indicates the intention of Congress that the ascertainment as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.*"

W. T. Nugent holds said money adversely both to E. B. Nugent and the trustee; he declines to pay same to anyone. It requires proceedings to compel him. The conversion is complete; a right of action exists against him for the money. *He is a debtor, as well as a transferee.*

In the matter of Charles Mayer, bankrupt, 98 F. R., 840, in construing Section 41, the Court says: "Nor can it be

used to coerce the bankrupt or transferees to make estitution of money or property previously transferred in fraud of the Act." *Fraudulent transfers which have been consummated can not be reached by this summary proceeding.*

It may be true that if the money is under the control of the bankrupt, in the hands of a third party, he may be ordered to pay, and in case of refusal can be punished for contempt, as the money is under his control; but the transferee, obtaining possession before bankrupt proceedings, can not be held for contempt.

The case of Bardes vs. Hawarden Bank, 178 U. S., 524, is one wherein this Section 23 of the Bankrupt Act was fully considered and construed, and in that case the Court says:

> "It was also repeatedly held by this Court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy, to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit, at law or in equity, under the second section of the Act of 1867; and not by summary proceedings under the first section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend 'to the collection of all the assets of the bankrupt,' and 'to all acts, matters and things to be done under and in virtue of the bankruptcy,' until the close of the proceedings in bankruptcy. Smith vs. Mason (1871), 14 Wall., 419; Marshall vs. Knox (1872), 16 Wall., 551, 557; Eyster vs. Goff (1875), 91 U. S., 521, 525.
>
> * * * *
>
> "On the contrary, Congress, by the second clause of Section 23 of the present Bankrupt Act, appears to this

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Court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant,' of which there is no pretense in this case."

* * * *

"For the reasons above stated we are of opinion that the questions of jurisdiction certified by the District Judge should be as follows:

"1st. The provisions of the second clause of Section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

"2d. The District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy."

For respondent it is contended:

First. The referee had no authority or jurisdiction to permit the petition of the trustee seeking to make W. T. Nugent a party to said bankrupt proceedings and compel him to

pay, to be filed before him, or to make any orders thereunder—because there was no *certificate filed*, as required under Section 38, in order to give him power to act, showing the sickness or absence of the Judge, or his inability to act—even if it be conceded that the referee has authority, in any state of the case, to make new parties. In the case at bar W. T. Nugent was not a necessary party to said proceedings, and the Court would not have been authorized to bring him into said bankrupt proceedings. The filing of this petition and the whole proceedings thereunder are absolutely void.

Second. Under Section 23 of the Bankrupt Act, in no state of the case is the "*District Court*" given jurisdiction of cases by the trustee against adverse claimants except where the defendant *consents* to such jurisdiction. The entire proceedings had herein were in the "*District Court*," and it is not contended that defendant ever consented to its jurisdiction, but on the contrary he was objecting to same at every step.

Third. The "consent of the proposed defendant," mentioned in Section 23 of the Bankrupt Act of 1898, applies only to "*suits*"—that is, "*plenary actions*," in contradistinction to *proceedings in bankruptcy or summary proceedings*, and therefore, under this section, jurisdiction can not be obtained of a summary proceeding by consent.

Fourth. The proceedings herein against W. T. Nugent were summary—against a stranger to the bankrupt proceedings—without any consent given by him to the jurisdiction, and upon findings by both the referee and Court that the money was transferred to him to pay debts before the proceedings in bankruptcy were filed.

He can not, therefore, in this proceeding, be required to answer and state the nature of his holding, whether or not

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he has preferred himself as a creditor, or others, or what disposition has been made of said money. These are matters of defense and go to the merits of the case.

He is entitled to be given, under "due process of law," an opportunity to be heard before any judgment is entered against him, and he can not be deprived of this right simply by allegations of petitioner's pleadings, the findings of the referee or Court, or what the proof taken in said proceedings may show *as to how, or upon what terms or conditions he received said money, or how he holds it*, because he is not a party to said proceedings, and is not bound by them; the District Court in which they are pending has no jurisdiction of him.

Petitioner charges that W. T. Nugent received the money to pay debts, and that he fails and refuses to pay same over to him; the referee and Court both find that he so received it before the bankruptcy proceedings were begun. Respondent is entitled to plead to, and put in issue all or any of these charges, but he is not required to do so until the aid of a court *having jurisdiction of him* has been invoked, and the Circuit Court of Appeals so held, following:

Bardes vs. Hawarden Bank, 178 U. S., 524.
Smith vs. Mason, 14 Wallace, 419.
Marshall vs. Knox, 16 Wallace, 551.
Eyster vs. Goff, 91 U. S., 521.

The Circuit Court of Appeals having determined this case upon the question of jurisdiction alone, any error that may have been committed by the Court in failing to act upon the motion to expunge certain matters from the record is unnecessary to be considered on this motion for *certiorari*

—as the result would have been the same whether or not said matters had been expunged. And the same is true as to the issual of the *forthcith mandate;* that was merely a matter looking to the execution of said judgment, and does not affect the validity or correctness of said judgment.

Respectfully submitted,

ZACH PHELPS,
FRED FORCHT, JR.,
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*Counsel for Respondent.*

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No. 257.

Office Supreme Court, U.S.
FILED
2873
OCT 25 1901
JAMES H. McKENNEY,
Clerk.

Brf. of Smith for Respondent.

# Supreme Court of the United States

OCTOBER TERM, 1901.

Filed Oct. 25, 1901.

**ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, . . . Petitioner,**

**vs.**

**WILLIAM T. NUGENT.**

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**On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.**

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## BRIEF FOR WILLIAM T. NUGENT, RESPONDENT.

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Petition for Certiorari filed February 26, 1901.
Certiorari and Returns filed March 26, 1901.
(19061.)

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FRED. FORCHT, JR.,
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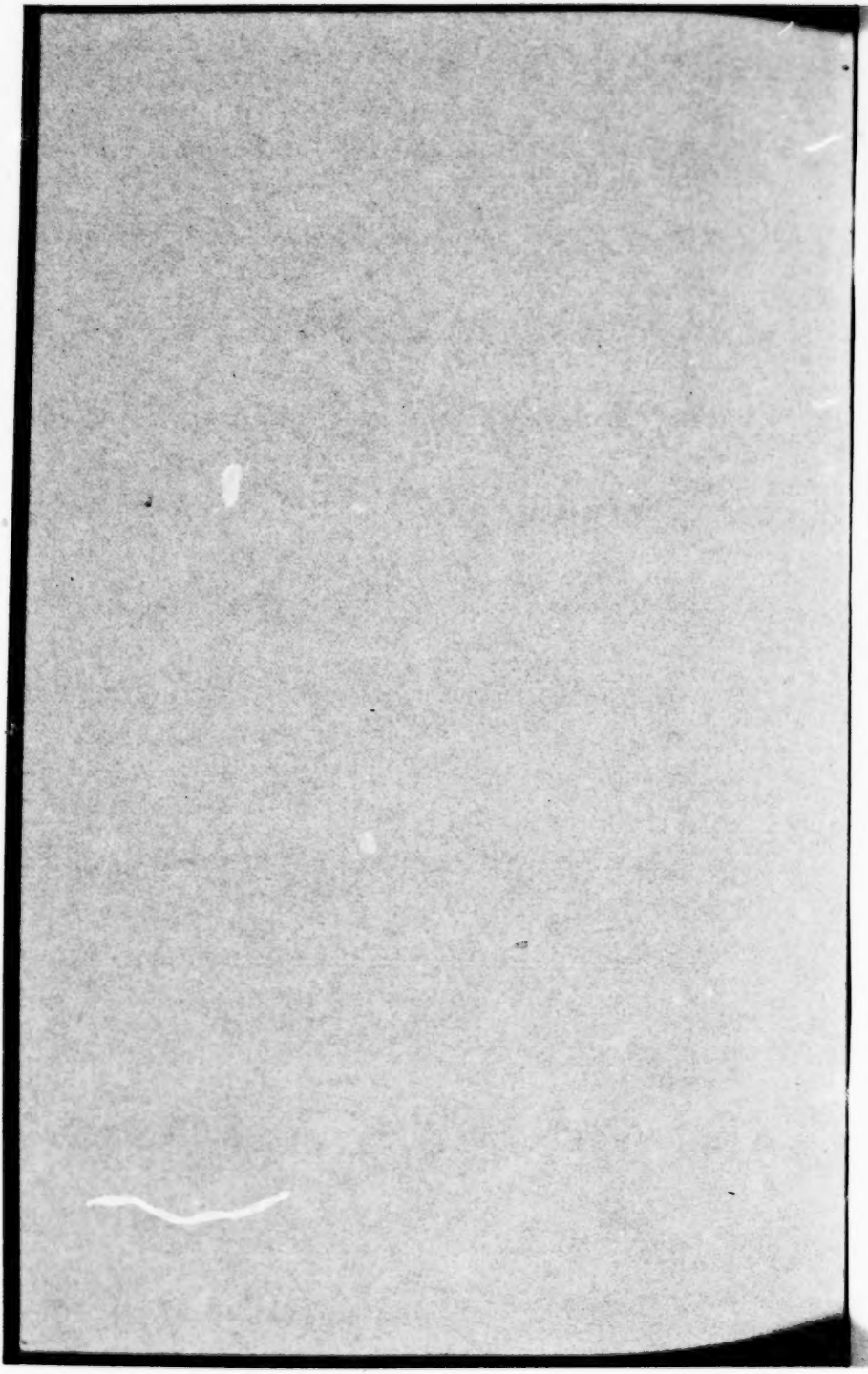
P. O. HUNNICUTT PRESS, LOUISVILLE, KY.



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# Supreme Court of the United States.

**October Term, 1901. No. 257.**

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, . . . *Petitioner*,

vs.

WILLIAM T. NUGENT.

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.**

## BRIEF FOR WILLIAM T. NUGENT, RESPONDENT.

### STATEMENT OF THE CASE.

E. B. Nugent, the bankrupt, was ruled herein, before the referee, to pay to the trustee $14,435.95, money in his possession, custody and control. He answered, and his answer was held insufficient, and he ordered to pay, and failing to do so, said referee certified the fact to the Court with recommendation that he be punished for contempt. The Court upon hearing sustained the order to pay, but upon the suggestion that owing to the condition of his mind, said Nugent was not a fit subject for punishment, the Court gave a hearing and discharged him.

On the 13th day of April, 1900, the trustee filed a petition before the referee for and obtained an injunction thereon restraining W. T. Nugent from disposing of said money, and requiring him to show cause, within five days after the service of the summons on him, why he should not be required to pay said money to the trustee. This injunction was granted and the order made, upon the allegation of said petition, and without notice to W. T. Nugent.

In the mean time an indictment was returned against W. T. Nugent in the United States District Court, containing three counts—charging him with the offense of receiving this $14,435.95 of the assets of E. B. Nugent *after the filing of the petition in bankruptcy against said E. B. Nugent*, to defeat the Act of bankruptcy, and, in another count, with retaining and aiding and abetting in the retention of same, both after the filing of said petition and the adjudication.

W. T. Nugent was arrested on said indictment and placed in jail. Then said injunction and order, issued upon the petition filed before said referee in favor of the trustee against him, were served on him—and he was then brought from jail before said referee for examination and response. He thereupon filed his response, which is as follows:

> "Defendant, W. T. Nugent, for response to the order made herein on April 13, 1900, requiring him to pay $14,435.95 to the trustee herein, says that as shown by the pleadings, records and the evidence in this case taken, and the entire proceedings had herein, neither the Court nor the referee in bankruptcy herein has any jurisdiction either of this respondent or the matter involved to make any such order, or to require this respondent to answer thereto, because he says that said records herein show

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that if respondent received said money, or any part thereof, it was **before the petition in bankruptcy was filed,** and in that event neither the Court nor the referee in bankruptcy can proceed against this respondent, as herein attempted, by order or rule to pay, and he now hereby asks that this be taken as his response herein and that said order be set aside and vacated. He says that at no time *since the filing of the petition in bankruptcy* herein has he received said $14,435.95, or any part thereof.

"Defendant for further response herein says that he ought not to be required to respond as to the matters herein set forth or any of them, because he says that within the last few days he has been indicted in the District Court of the United States for the District of Kentucky, sitting at Louisville, charged with the offense of receiving said $14,435.95 after the filing of the petition in bankruptcy against E. B. Nugent, and also with retaining same and aiding and abetting in the retention thereof, both after the filing of said petition and the adjudging of said Nugent a bankrupt thereunder, for the purpose of defeating the bankrupt law. He says that said indictment is still pending undetermined, and his response herein in regard to these matters would tend to criminate him thereunder. He says that this indictment grew out of the transactions upon which this litigation is based, and said indictment is based upon the identical transactions that he is now called upon to respond in reference thereto, and that he is now in jail under said charge awaiting trial, and to compel him to respond herein would deprive him of the constitutional right guaranteed to him by the Constitution, that is, that he shall not be compelled to give evidence as against himself.

"And now having fully responded herein, he prays that the order herein be set aside and vacated, and that he be dismissed from further response thereto."

The referee held that said Nugent could not be examined touching any of the matters that might tend to criminate him under said indictment, but adjudged his response insufficient, and respondent then filed his petition for review, and the referee certified said matter to the Court—and stated as his finding that said W. T. Nugent received **all** of said money **before the petition in bankruptcy was filed,** but that he received same as agent of his father to **pay debts,** and recommended that he be punished for contempt.

The Court rendered his opinion, which is filed with the record sustaining said referee—but before sentence or judgment was rendered thereon, respondent offered the following amendment, which the Court refused to permit to be filed, to wit:

"UNITED STATES DISTRICT COURT.

DISTRICT OF KENTUCKY.

WAYNE KNITTING MILLS, ET AL.,

vs. AMENDED RESPONSE

E. B. NUGENT, BANKRUPT.

"Defendant, W. T. Nugent, by way of amended response herein, files herewith a copy of the indictment against him referred to in his original response, and marks same 'W. T. N.,' and files same as an exhibit herein, and as part of this response. He says that while it is true that the referee held his response herein as insufficient, he says that it is further

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true that said referee stated and held, at the time, that he could not be required to respond herein as to matters that had a tendency to incriminate him under said indictment, and refused to permit him to be examined by said trustee as to any matters or transactions directly or indirectly relating to the transactions involved in said indictment. Respondent says that, believing as he did, and being advised that he could not be legally required to respond to any such transaction, and by reason of said ruling of the referee, he did not make his full response as to the entire facts.

"He now asks to amend said response, and states that he has not the $14,233.45 or any part thereof now in his possession or under his control, and did not have same in his possession or under his control at the time the process was served on him herein on October 8, 1900, nor did he have any notice of any injunction herein until said service. He says that neither at the time of the filing of the petition in bankruptcy herein against E. B. Nugent, nor at any time subsequent thereto, did he have in his hands any amount of money belonging to said Nugent which he held as his agent or bailee. He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent, or any such money at any subsequent date thereto, was not received or held by this respondent as agent or bailee or in any trust capacity whatever, but was held adversely to said E. B. Nugent.

"And he prays as in his original response."

And the Court thereupon rendered the following judgment and sentence, to wit:

"DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF KENTUCKY

In the matter of

WAYNE KNITTING MILLS, ETC.,

VS. IN BANKRUPTCY

EDWARD B. NUGENT.

"Came William T. Nugent, respondent herein, and tendered an amended response and moved to file same, and the Court, not having postponed the imposing of the sentence for that purpose, and being of opinion that it was not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the Court, declined at this stage of the proceedings to permit a further response to be filed.

"And thereupon, pursuant to the opinion of the Court filed herein on the 1st instant, it is the judgment of the Court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson County, Kentucky, until he shall deliver or pay to Arthur E. Muelier, the trustee herein, said sum of $14,233.45 or otherwise satisfy the said trustee with respect thereto, and the Court reserves the right and power to suspend or set aside this judgment and sentence upon the delivery, payment or satisfaction aforesaid.

"To all of which the respondent, William T. Nugent, excepts."

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And to review said proceedings, orders, sentence and judgment, said W. T. Nugent filed his petition for review. Said Nugent was then in jail under said sentence, and had entered motion for bail during the pendency of the proceedings. The petition for review is under Sub-section "b" of Section 24 of the Bankrupt Act of 1898, which provides:

> "The several Circuit Courts of Appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law, the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

## POINTS OF LAW STATED.

For W. T. Nugent, it is contended—

*First:* That neither the referee nor the Court has the right or jurisdiction to proceed in the summary way had, against a third party to whom property had been transferred before the filing of the petition in bankruptcy.

*Second:* That the referee had no right or jurisdiction of the petition filed before him by the trustee against W. T. Nugent, or to make any order or grant the injunction thereon.

*Third:* That the Court and referee erred in holding the response filed before the referee insufficient.

*Fourth:* That the Court erred in refusing to permit the amended response to be filed.

*Fifth:* That the Court erred in sentencing W. T. Nugent to be imprisoned for an indefinite length of time or until he pay said money to the trustee.

*Sixth:* That the order and sentence thereunder are erroneous and void, because they do not run in the name of the Government.

*Seventh:* That as against W. T. Nugent, under the findings, in no event can the failure to pay be more than a *civil contempt*, if that; and that, as such, same is subject to review under Sub-section "b" of Section 24 of the Bankrupt Act of 1898; and that pending said review, said Nugent is entitled to be released on bond, conditioned for his personal appearance.

## ARGUMENT.

As to the first proposition—

The right to proceed in this summary way against a party to whom property had been transferred before the filing of the petition in bankruptcy.

It is held by both the referee and the Court that W. T. Nugent received the money he is ordered to pay *before the filing of the petition in bankruptcy.*

By Sub-section "b" of Section 23 of the Bankrupt Act it is provided:

> "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

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The response of W. T. Nugent, filed before the referee, does not *consent* to the jurisdiction, but, upon the contrary, pleads specially thereto, as follows:

> "Defendant, W. T. Nugent, for response to the order made herein on April 13, 1900, requiring him to pay $14,435.95 to the trustee herein, says, that as shown by the pleadings, records and evidence in this case taken, and the entire proceedings had herein, neither the Court nor the referee in bankruptcy herein has any jurisdiction either of this respondent, or the matter involved, to make any such order or to require this respondent to answer thereto, because he says that said records herein show that if respondent received said money or any part thereof, it was before the petition in bankruptcy was filed; and in that event neither the Court nor the referee in bankruptcy can proceed against this respondent as herein attempted by order or rule to pay, and he now hereby asks that this be taken as his response herein, and that said order be set aside and vacated. He says that at no time since the filing of the petition in bankruptcy herein has he received said $14,435.95 or any part thereof."

He then adds as a further reason why he should not be compelled to plead to said order and rule, the pendency of the indictment against him in regard thereto, and while the referee held this response insufficient, thus sustaining his jurisdiction, over respondent's plea thereto, he also held that respondent could not be examined as to these matters by reason of said indictment. (See deposition of W. T. Nugent, page 33, Transcript, as to this ruling.)

The first part of Section 23 of said Act provides:

"The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

That is, that diverse citizenship and the requisite amount must exist, and be involved, to give the United States Circuit Court jurisdiction in suits between trustees and adverse claimants.

And Sub-section "b" of said Section 23 provides that such suits, not embraced by the first part of said section, must be brought where the bankrupt, had not such bankrupt proceedings been instituted, could have brought and prosecuted them, *unless by consent of the proposed defendant.*

This clause concerns the jurisdiction only, and not the merits of the case; the forum in which the case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. Whenever it is shown by the pleadings, or ascertained by the findings of the referee, as in this case, that "*the proposed defendant*" received the money sought to be recovered from him *before the filing of the petition in bankruptcy*, then the trustee's only remedy is his action under Sub-section "b" of Section 23—for, to obtain jurisdiction otherwise, as a condition precedent, the "*proposed*" defendant

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must *consent* thereto, and as he did not *consent* in this case, but resisted, at all times, such jurisdiction, neither the referee nor Court had the right to require him to respond and say how he held or claimed this money, or what disposition he had made of it. The Court must first obtain jurisdiction of him before he can be made to respond (or failing to respond), before the Court can take action against him.

By Section 41 of the Bankrupt Act it is provided: "A person shall not, in proceedings before a referee, disobey or resist any lawful order, process or writ," and the section further provides that in case of such disobedience the matter shall be certified to the Court where punishment may be inflicted upon him the same as if the offense had been committed before the Court.

Sub-section 13 of Section 2 of said Act gives to the Court authority to "enforce obedience by bankrupts, officers and other persons to all lawful orders by fine or imprisonment or fine and imprisonment."

It seems perfectly clear, in view of Section 23, that the "*other persons*" referred to in this Sub-section 13 of Section 2 are only such persons as the Court has obtained jurisdiction of, or such as interfere in said proceedings, or obtain the assets after the filing of the petition in bankruptcy, or the adjudication thereon.

Section 29 refers only to offenses punishable by indictment; so the twenty-third section must govern in this case.

But it is contended for the trustee that W. T. Nugent is not an adverse claimant, and therefore not embraced in Section 23. That while it is true that he obtained the money **before the filing** of the petition in bankruptcy, he received

and held same as agent **to pay debts,** and therefore can be dealt with summarily.

The Court in an opinion rendered, found on page 28 of the Record, finds the facts of the case to be as follows:

"In this case the petition in involuntary bankruptcy was filed against the bankrupt about five o'clock p. m., February 19, 1900. Some hours earlier on that day the bankrupt, who for many years had been a prominent retail dry goods merchant in the city of Louisville, Ky., sold and delivered to Herman Straus, another retail dry goods merchant in the same city, his entire stock of merchandise, which was thereafter very speedily removed to the latter's store. The agreed price was $12,000, and early in the afternoon of the same day a check on the German Bank for the amount, payable to the bankrupt, was given by the purchaser to him. He at once endorsed it, and handed it to his son and agent W. T. Nugent, the respondent, to get for him the cash upon the check, which by two o'clock p. m., the respondent had done.

"On the 9th day of February, 1900, the bankrupt had mortgaged the house and lot in Louisville, in which he resided, to George L. Everbach and Frank Hohmann, executors, for $4,500, and this money, on the same day or soon thereafter came to the hands of the respondent as agent of his father.

"Out of the $12,000 thus obtained there were paid certain sums which are not in controversy, and out of the $4,500 thus obtained certain other sums were paid, about which we need not concern ourselves. But at the time of the filing of the petition, and at the time of the adjudication on March 23, 1900, the respondent held in his hands, as custodian and agent for his father, $10,000 received on the $12,000 check, and $4,133.45 received out of the proceeds of the mortgage. The creditors

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appointed Arthur E. Mueller, trustee for the bankrupt's estate, and he on the 13th day of April, 1900, filed a petition before the referee asking for a rule against the bankrupt to show cause why he could not be required to pay the two sums last above mentioned, amounting to $14,233.45, to the trustee. The bankrupt appeared and in substance stated in his response to the rule that the entire sum was in the hands of his son, who had gone, he knew not whither, and he found it impossible to pay the money for that reason. The referee, thinking this response insufficient, so adjudged, and ordered the bankrupt to pay the entire sum to the trustee. The bankrupt failing to do this, the referee held him to be guilty of contempt, and reported his action to the Court with the recommendation that the bankrupt be punished therefor.

"Pending the action of the Court upon this report and recommendation, the bankrupt's counsel suggested to the Court that the bankrupt, then about eighty years of age, was mentally unsound. Whereupon the Court ordered and, late in June, 1900, had a special hearing upon this phase of the case, and was of opinion, from the evidence of the medical experts, that approaching senile imbecility possibly then made the bankrupt an unfit subject of punishment or of the summary processes of the Court. At all events he was given the benefit of the doubt.

"For several months thereafter, the son, W.T. Nugent, the respondent, had continued in hiding, but in October, 1900, was found, and soon afterward was indicted in this Court upon charges of receiving and concealing certain assets of the bankrupt.

"On the 13th day of April, 1900, upon the petition of the trustee, the respondent, W. T. Nugent, was enjoined from disposing of all or any part of the said sum thus in his hands, and was then ordered to show cause, if any he could, within five days from the service of a copy of the

order, why he should not be required to pay said sum of money to the said trustee. A copy of that order was served upon the respondent on October 8, 1900. On the 13th day of October he filed his sworn response in the following language. (Here the response is copied in full, which is a plea to the jurisdiction, *Transcript*, 19.)

"Upon a hearing thereof the referee adjudged that the response was insufficient, and no further response was tendered. Whereupon the rule was made absolute, and on October 16th the respondent was ordered to pay to the trustee at 9:30 o'clock a. m., of the next day, the sum of $14,233.45, being the amount in his hands, in the manner stated, and belonging to the bankrupt's estate. The respondent having failed to obey this order, or to pay any part of the money, the referee adjudged him to be in contempt, and recommended that the Court impose a punishment therefor. The Court finds the facts of the case to be as stated, with the addition that the entire amount, $14,233.45, is the property of the bankrupt's estate alone; that it had been taken possession of, and was held by W. T. Nugent, as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim of right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in any wise to have claimed it adversely to the bankrupt or the trustee."

It will be seen that the important facts thus determined by the Court are:

1st. That W. T. Nugent received all the money he is now ordered to pay before the filing of the petition in bankruptcy.

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2d. That he held same in his hands at the time of the filing of the petition in bankruptcy, on February 19, 1900, and at the time of the adjudication, on March 23, 1900, as custodian and agent of his father, E. B. Nugent, the bankrupt. That said money is the property of the bankrupt's estate. That W. T. Nugent never claimed same adversely to the bankrupt or trustee, or claimed to have converted same to his own use.

3d. That E. B. Nugent, the bankrupt, was ruled to pay said money into Court and responded that same was in the hands of his son, and that he had gone, he knew not whither, and that it was impossible for him to pay same. That the referee held the response insufficient and ordered him to pay, and he failing, recommended that he be punished for contempt, and pending the matter, upon suggestion, the Court discharged him on account of age.

4th. That for several months W. T. Nugent remained in hiding, but in October, 1900, was found and indicted for receiving and concealing assets of the bankrupt. That on April 13, 1900, on the petition of the trustee, W. T. Nugent was enjoined from disposing of said money, and ordered to show cause, within five days from service of said order, why he should not be required to pay the money to said trustee. That said order was served October 8, 1900, and on October 13th he filed his response, which the referee adjudged insufficient, and failing to respond further was ordered to pay, and not complying was held in contempt and sentenced.

The findings of the facts by the referee are similar to those of the Court, **except the referee does not find that this money was in the hands of W. T. Nugent at the time of the filing of the petition or the adjudication thereon, nor does he find**

**that W. T. Nugent did not hold same adversely.** He does find, however, that he received the money as agent and has not accounted therefor, **and only this.**

The Court's attention is specially called to the following quotation from the opinion found on pages 32 and 33 of the Record:

> "Upon a hearing thereof the referee adjudged that the response was insufficient, and no further response was tendered. Whereupon the rule was made absolute, and on October 16th the respondent was ordered to pay the trustee, at 9:30 o'clock a. m., of the next day, the sum of $14,233.45, being the amount in his hands in the manner stated and belonging to the bankrupt's estate. The respondent having failed to obey this order, or to pay any part of the money, the referee adjudged him to be in contempt, and recommended that the Court impose a punishment therefor. The Court finds the facts of the case to be as above stated, with the addition, **that the entire amount, $14,233.45, is the property of the bankrupt's estate alone; that it had been taken possession of, and was held by W. T. Nugent, as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim of right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in any wise to have claimed it adversely to the bankrupt or the trustee."**

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Which conclusively shows, that from the fact that the money came to the hands of W. T. Nugent as agent, and as he was given an opportunity under the order issued to respond, and say, whether he had paid it to creditors or squandered it, or set up adverse claim to it—**and failing to avail himself of this privilege**—the Court concludes, and finds as facts, that he had the money **both at the time of the filing of the petition and the adjudication thereon**, and that he never claimed same, nor had he squandered it, or converted it to his own use.

That these findings are all deductions drawn by the Court from the fact that he received the money **as agent**, and refuses to make any response in regard thereto, to said order, is clearly shown by and stated in said opinion; and besides, this must necessarily be true, because the Court finds he took the money and went into hiding and when arrested in October, 1900, refused and still refuses to tell anything about it, and there is not a scintilla of evidence in said case as to said money after it went into the hands of W. T. Nugent; before the filing of the petition in bankruptcy. W. T. Nugent is the only one that can tell *how he held it, or what became of it*, and the referee refused to compel him to answer in reference thereto, as is shown by his deposition. And besides, **a stipulation** is filed herein, as part of this Record (see Transcript page 39), showing that no evidence was heard, taken or filed either before the referee or the Court as to this money, after Nugent received same, except that he had not paid it to the trustee. Then the sole facts, as found by the referee, upon which this opinion is based are, "*that W. T. Nugent received this money as agent of his father, before the filing of the peti-*

*tion in bankruptcy, and has never accounted to the trustee therefor and refuses to.*"

The additional findings by the Court are simply deductions, drawn from the above findings of fact by the referee, and **there being no evidence whatever** to support same, are not binding upon this Court on review, and same is assigned as error in Assignment No. VIII, page 6 of Transcript, which is as follows :

> " In said Court finding the facts to be, and adjudging that said sum is the property of the bankrupt's estate, and that it had been taken possession of, and was held by W. T. Nugent, as the agent of his father, up to and at the time of the adjudication, and that said W. T. Nugent never claimed title to any of it, nor made any claim of right to it by reason of an attempted transfer of title or ownership thereof to him at any time, either in fraud of the bankrupt's creditors or otherwise, and that he had never claimed to have converted it to his own use, or to have claimed it adversely to the bankrupt or trustee."

It is contended that the holding by W. T. Nugent of this money was not an adverse holding, and therefore not under Section 23.

He is a stranger to the bankrupt proceedings, and to bring him into the case, the jurisdictional fact must exist, and that, in this case, could only be *his consent.*

He holds said money adversely both to E. B. Nugent and the trustee; he has, as is shown, declined to pay same to any one. The conversion is complete; a right of action exists against him for the money. *He is a debtor, as well as a transferee.*

In the matter of Charles Mayer, bankrupt, 98 F. R. 840, in construing Section 41, the Court says: "Nor can it be

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used to coerce the bankrupt or transferees to make restitution of money or property previously transferred in fraud of the act." *Fraudulent transfers which have been consummated cannot be reached by this summary proceeding.*

It may be true that if the money is **under the control of the bankrupt,** in the hands of a third party, he may be ordered to pay, and in case of refusal, can be punished for contempt, as the money is under his control; but the transferee, obtaining possession before bankrupt proceedings, cannot be held for contempt. This is the exact case of "*In re* Rosser," 101 F. R. 562, and that case intended to determine no more than as above contended, as is fully shown by the concluding sentence in said decision, on this proposition:

> "If the money or property in controversy was part of the estate of the bankrupt, but before the order for its delivery is made, he has squandered, disposed of, or lost it, so that it is not in his control or possession, and he cannot obtain and deliver it at the time the order of delivery is made, or within a reasonable time thereafter, it cannot be a lawful order, because the Court may not order one to do an impossibility, and then punish him for refusal to perform it. The punishment of the bankrupt for such acts must be sought under the provisions of the bankrupt law relative to the fraudulent concealment of the property of the estate and making of false oaths relative thereto. But if it appears to the satisfaction of the referee or the Court that property of the bankrupt estate is in the control or possession of the bankrupt, a lawful order for its delivery to the trustee may be made, and a refusal to obey this order may be punished as a contempt of the Court, both under the general law relative to contempts and under the specific provisions of the Bankrupt Act."

The case of Bardes vs. Hawarden Bank, 178 U. S. 524, is one wherein this Section 23 of the Bankrupt Act was fully considered and construed, and in that case the Court says:

"It was also repeatedly held by this Court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy, to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit, at law or in equity, under the second section of the Act of 1867; and not by summary proceedings under the first section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend 'to the collection of all the assets of the bankrupt,' and 'to all acts, matters and things to be done under and in virtue of the bankruptcy,' until the close of the proceedings in bankruptcy. Smith vs. Mason (1871), 14 Wall. 419; Marshall vs. Knox (1872), 16 Wall. 551, 557; Eyster vs. Goff (1875), 91 U. S. 521, 525.

* * * *

"In Eyster vs. Goff, just cited, this Court, speaking by Justice Miller, said: 'The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction, and that other Courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a

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rule to show cause, and to dispose of their rights in a summary way. This Court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent with and does not divest that of the State Courts.'

* * * *

" 'The first clause provides that 'the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy' (thus clearly recognizing the essential difference between proceedings in bankruptcy on the one hand and suits at law or in equity on the other) 'between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees,' restricting that jurisdiction, however, by the further words, 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.' This clause, while relating to the Circuit Courts only, and not to the District Courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdic-

tion of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.

* * * *

"It was argued for the appellant that the clause cannot apply to a case like the present one, because the bankrupt could not have brought suit to set aside a conveyance made by himself in fraud of his creditors. But the clause concerns the jurisdiction only, and not the merits of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property, which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the Court to entertain and determine it.

"The bankrupt Acts of 1867 and 1841, as has been seen, each contained a provision conferring in the clearest terms on the Circuit and District Courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of the property of the bankrupt. We find it impossible to infer that when Congress, in framing the Act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of Section 23, it is intended that neither of those Courts should retain the jurisdiction which it had under the obsolete provision of the earlier Acts.

"On the contrary, Congress, by the second clause of Section 23 of the present Bankrupt Act, appears to this

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Court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant,' of which there is no pretense in this case.

* * * *

"For the reasons above stated we are of opinion that the questions of jurisdiction certified by the District Judge should be as follows:

"1st. The provisions of the second clause of Section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

"2d. The District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy."

The Court is also respectfully referred to the case of John D. Wall, et al., vs. Walter O. Cox, etc., decided by this Court

April 29, 1901, which is in exact line with the case of Bardes vs. Hawarden Bank, and these two cases constitute the class to which this case at bar belongs.

Petitioners rely on the case of Bryan vs. Bernheimer, decided by this Court April 15, 1901, but that case falls entirely in a different class. In that case Davidson held the property under a trust deed of assignment at the time the petition in bankruptcy was filed; in fact, said assignment constituted the grounds of bankruptcy charged in said petition. Bernheimer, with the full knowledge of the nature of Davidson's holding and also of the bankrupt proceedings, obtained this property from Davidson. A petition was filed by the creditors before the District Court of the United States as a court of bankruptcy, setting out all of these facts, and praying the Court to take possession of said assets, including the goods held by Bernheimer, and to grant the general relief necessary. On this proceeding the District Court required Bernheimer to answer by a day named, and he did appear, making no objection to the jurisdiction, but consenting thereto by filing his answer, setting out his claim fully and praying for an adjudication thereon and necessary relief, etc.

The proceedings in the case at bar are very different. They were instituted not in the District Court of the United States as a Court of Bankruptcy, but entirely before the referee. The petition on which they were based was filed before said referee, and the order requiring W. T. Nugent to answer, etc., was issued by him; in fact, said entire matter from its inception to the end thereof was had before said referee, and at no stage of the case did W. T. Nugent consent to the jurisdiction, or by any act of his waive it, but, upon

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the contrary, his first appearance to said order was by a special plea to the jurisdiction. The entire proceedings in this case and findings made by both the court and the referee establish the fact that W. T. Nugent received the money, sought to be recovered from him, from his father, E. B. Nugent, before any proceedings in bankruptcy were instituted. The nature of the holding of said W. T. Nugent is entirely different from that in the case of Bryan vs. Bernheimer, and as soon as the court acted upon the plea in abatement, that is, the plea of W. T. Nugent before the referee to the jurisdiction, said Nugent tendered an amended plea, alleging as fully as he could, considering the indictments pending against him, and stated that his holding was adverse. It is contended by petitioners in brief filed that this plea was not made a part of the record, but that this is incorrect is apparent, because a certified copy thereof appears in the transcript herein. (Page 30.)

In conclusion, upon the first proposition, for W. T. Nugent it is insisted:

That as he received the money he is ordered to pay before the proceedings in bankruptcy were begun, he cannot be made a party to said bankrupt proceedings and required summarily to answer thereto, but that he must be proceeded against by separate action under Section 23 of the Bankrupt Act.

That the fact that he received this money as agent of his father does not give the Federal Court jurisdiction to proceed against him; that when it is shown he received it before the bankrupt proceedings were begun, said Court cannot acquire jurisdiction except by his consent, and consequently can

**not require him to answer, or to set up or renounce his claim thereto.**

That by his failure and refusal to pay either E. B. Nugent or the trustee, he became a debtor, as well as a transferee, and to collect said claim, the trustee can not proceed summarily against him in the bankrupt case, but must sue under Section 23.

As to the second proposition—

That the referee had no jurisdiction of the petition filed before him by the trustee against W. T. Nugent, or to make any order or to grant the injunction thereon:

W. T. Nugent received the money sought to be recovered of him before the bankrupt procedings were begun. He was not a party to said proceedings. The trustee undertook to make him a party, by filing a petition in said bankrupt proceedings before the referee against him, and without service of process or notice on said petition the referee granted an order against W. T. Nugent to show cause, five days after service, why he should not pay this money to the trustee, and granted an injunction prohibiting him from disposing of same. This was on April 13, 1900, and on October 8, 1900, this order was served, and to this Nugent filed a response, pleading to the jurisdiction, and on this, all the proceedings had in this matter, were taken against him. This petition is found on page 13 of the Transcript, and the order, injunction and service on page 16. All of this is assigned as error. (See Assignment of Errors, Transcript, page 6.)

The Court in the opinion rendered, on page 31 of the Record, says:

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"The important inquiry is, had the referee power to make the order requiring payment by respondent of the moneys? If not, the matter is at an end, but if he had the power, then it follows, almost as a matter of course, that the refusal to obey the order was a contempt which the Court may punish under the express provisions of the Act. Those provisions are found in Section 2 of the Act and give to the Court of bankruptcy power (6) 'to bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto; (13) to enforce obedience by bankrupts, officers, and other persons to all lawful orders by fine or imprisonment or by fine and imprisonment; (15) to make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act.' And (16) 'to punish persons for contempt committed before the referee.' Section 41 provides that, 'A person shall not, in proceedings before a referee, disobey or resist any lawful order, process or writ."

If the contention made under the first proposition is correct, that is, that the Court had no right to proceed against a third party not a party to the bankrupt proceedings, in the summary manner had, then it follows, as a matter of course, that the referee had no such authority, for an officer exercising only an authority of reference, cannot have greater power than the Court referring the matter to him. But if the first contention is not sustained, still it is earnestly insisted that the proceedings had herein are absolutely void, because if the

Court had authority to bring in W. T. Nugent as a *new party* in this case, which is questioned, the law does not, *in any case*, vest such authority **in the referee.**

The powers of the referee are fully defined in Section 38 of the Act, and the only power granted that defendants in error can insist, by any construction, could apply to this case, is given by Section 38, in which the referee is given the right to (3) "exercise the powers of the Judge for the taking possession and releasing of the property of the bankrupt *in the event of the issuance by the Clerk of a certificate showing the absence of a Judge from the judicial district or his sickness or his inability to act.*"

It is not a fact, as is shown by the Record, and is not contended herein, that any such certificate was issued by the Clerk at the time this petition was filed by the trustee before the referee making W. T. Nugent a party to these bankrupt proceedings, or at the time the injunction was issued thereon, or the order made requiring W. T. Nugent to show cause, within five days after service, why he should not pay said money to the trustee.

Then if the authority to file said petition or to make said order thereon is not vested in the referee, he had no right to require W. T. Nugent to respond thereto, or to certify him for contempt for not obeying same, or paying said money over thereunder, because said order was not a "lawful order" or "process," and is absolutely void, as are all proceedings thereunder.

Conceding, for the sake of argument, that the certificate of the Clerk was obtained, as required by Section 38 of Subsection 3 of the Bankrupt Act of 1898, it is earnestly con-

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tended that this would not have given said referee jurisdiction of the proceedings herein had.

By Section 1 of Sub-section 8, Courts of Bankruptcy are defined, and in said definition referees **are not included,** and by Chapter 2, which is headed "**Creation of Courts of Bankruptcy and Their Jurisdiction,**" the powers and jurisdiction of said Court are defined, this being the same section relied on by the District Court, as is shown from the quotation just made herein from the opinion there rendered. That Court seemed to have concluded that the referee was invested with all of the jurisdiction and powers conferred by said Section 2 on Courts of Bankruptcy. It is concluded from the brief of petitioners that this construction was made because of the definition of "**Courts**" found in Section 1, Sub.-sec. 7, in which it is said that **it may include the referee,** but that that is incorrect is apparent by an examination of the **powers and jurisdiction** conferred by the various Sub-sections of Section 2. They conclusively establish the proposition that these powers were never intended to be vested in the referee, and by a reading of said section it is apparent that all of them must be vested in said referee, if any, because the language in reference to each sub-section is similar.

As stated, powers of the referee are defined in Chapter 5, Sections 38 and 39, and in Section 38, Sub-section 3, he is given the powers of the "**Judge**" for the taking possession or releasing property of the bankrupt in the event of the issuance of the certificate showing the absence of the Judge from the judicial district, etc. The definition of a "**Judge**" is given in Sub-section 16 of Section 1 of the Act, and Section 69 of said Act provides that "a judge may, upon satisfactory

proof by affidavit that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect, his property, that it is thereby deteriorated or is thereby deteriorating or is about to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders," and it is concluded that Sub-section 3 of Section 38 refers alone to this Section 69.

As a general proposition, jurisdiction cannot be obtained by consent, and it is only by the Act, Section 23, that this can be done in a bankrupt proceeding, it being by consent. The statute must be strictly followed in order to obtain the jurisdiction to such proceedings as are authorized by the Act, so if the referee had no authority to proceed as herein, the action of the court thereon afterwards does not cure the defect, and the entire proceedings are void.

The Court can act in this matter only when it is necessary for a complete determination of the matter in controversy. The recovery of this money against W. T. Nugent was not involved in said bankrupt proceedings. There were proceedings against E. B. Nugent to recover same, but W. T. Nugent was not a necessary party to authorize the recovery against E. B. Nugent, but was made a party to said proceedings for the sole purpose of compelling *him* to pay.

In Bardes vs. First National Bank of Hawarden, 178 U. S. 524, in construing these sections referred to and relied on by the Court in its opinion, it is said:

> "*Third.* It includes, among the powers specifically conferred on the courts of bankruptcy, those to (4) 'arraign, try, and punish bankrupts, officers, and other

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persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations, for violations of this Act in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials, for the alleged violation of laws of the United States'; (6) 'bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided;' and (15) 'make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act.'

"The general provisions at the beginning and end of this section mention 'courts of bankruptcy' and bankruptcy 'proceedings.'

"Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words 'at law,' in the opening sentence conferring on the courts of bankruptcy, 'such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law, and not in equity.

"The section nowhere mentions civil actions at law, or plenary suits in equity. *And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to bring in and substitute additional parties, 'in proceeding in bankruptcy,' and, in clause 15, to make orders, issue process,*

*and enter judgments 'necessary for the enforcement of the provisions of this act.'*

"The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money, and distribution of the bankrupt's estate, is no broader than the corresponding provision of Section 1 of the Act of 1867; and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to 'determine controversies in relation thereto,' it is controlled and limited by the concluding words of the clause, 'except as herein otherwise provided.'

"The words 'herein otherwise provided' evidently refer to Section 23 of the Act, the general scope and object of which, as indicated by its title, are to define the 'jurisdiction of United States and State courts' in the premises. The first and second clauses are the only ones relating to civil actions and suits at law or in equity.

"The first clause provides that 'the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy' (thus clearly recognizing the essential difference between proceedings in bankruptcy on the one hand, and suits at law or in equity on the other), 'between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees,' restricting that jurisdiction, however, by the further words, 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.' *This clause, while not relating to the Circuit Courts only, and not to the District Courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question*

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*whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.*"

As to the third proposition—

That the Court and referee erred in holding the response filed before the referee insufficient:

If the contentions made under the first or second propositions be correct, then the response was sufficient, because it shows that the money was received before the proceedings in bankruptcy were instituted, and he pleads to the jurisdiction to proceed in the summary way. (See response, Transcript, page 19.)

As to the fourth proposition—

That the Court erred in refusing to permit the amended response to be filed:

The amended response is on page 30 of the Transcript, and which is part of the record, is as follows:

"Defendant, W. T. Nugent, by way of amended response herein, files herewith a copy of the indictment against him referred to in his original response and marks same 'W. T. N.' and filed same as an exhibit herein and as part of this response. He says that while it is true that the referee held his response insufficient, he says that it is further true that said referee stated and held at the time that he could not be required to respond herein as to matters that had a tendency to incriminate him under said indictment and refused to permit him to be examined by said trustee as to any matters or transac-

tions directly or indirectly relating to the transactions involved in said indictment. Respondent says that, believing as he did and being advised that he could not legally be required to respond to any such transaction, and by reason of said ruling of the referee, he did not make his full response as to the entire facts.

"He now asks to amend said response and states that he has not the $14,233.45, or any part thereof, now in his possession or under his control, and did not have same in his possession or under his control at the time the process was served on him herein on October 8, 1900, nor did he have any notice of any injunction herein until said service. He says that neither at the time of the filing of the petition in bankruptcy herein against E. B. Nugent, nor at any time subsequent thereto, did he have in his hands any amount of money belonging to said Nugent which he held as his agent or bailee. He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent or any such money at any subsequent date thereto, was not received or held by this respondent as agent or bailee or in any trust capacity whatever, but was held adversely to said E. B. Nugent.

"*And he prays as in his original response.*

"W. T. NUGENT."

The Court in the opinion clearly shows that the facts stated in the response constitute a good defense. W. T. Nugent stands indicted for *receiving this money*, and also for retaining same. (See Indictment, page 31 of Transcript.) It is said in the opinion that the respondent might prudently and rightfully choose not to criminate himself by any statement in his pleadings, yet the Court says he might avoid this by denying he received the money or paying it into

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Court. Plaintiff in error by reason of this indictment, when he filed his response, after pleading to the jurisdiction, set up the fact that this indictment was pending and presented the question to the Court as to whether or not he should be required to respond. The referee refused to let the trustee examine him by reason of this indictment, but held the response insufficient. He appealed to the Court by petition of review to determine the question of jurisdiction, and when the Court rendered the opinion determining the question against him, he then offered his plea, which, if filed, would have constituted the best of defenses. Supposing that W. T. Nugent could not truthfully deny that he received the money, and still did not have it so he could pay it into Court; say he had paid it on debts or squandered it. The Court says he might "prudently and rightfully choose not to criminate himself by any statement in his pleading," what course shall he pursue?

He first set up his plea to the jurisdiction, and also the facts of the pendency of the indictment. This plea was filed before the referee, and was nothing more than a plea *in abatement* or *bar*. As has been often held, "these contempt proceedings are of a criminal nature, and the same rules must govern as in the trial of indictments."

See Accumulator Co. vs. Consolidated Electric Storage Co., 53 F. R. 793.

Kirk vs. Milwaukee Dust Collector, 26 F. R. 501.

New Orleans vs. Steamship Co., 20 Wallace, 592.

*In re* Ellerbe, 13 F. R. 532.

So when the Court held this plea to the jurisdiction insufficient, W. T. Nugent should have been permitted to *plead over*. This he offered to do, tendering his amended plea as

soon as the Court had acted. The Court refused to permit him to file same, making the following order:

> "Came William T. Nugent, respondent herein, and tendered an amended response, and moved to file same, and the Court not having postponed the imposing of the sentence for that purpose, and being of opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, **especially after the delivery of an opinion of the Court,** declines at this stage of the proceedings to permit a further response to be filed."

It seems, in civil matters, that a party always has the right to *plead over* after action upon a plea in abatement or bar, and certainly this is the rule in criminal matters.

In Bishop's New Criminal Procedure, Vol. 1, Section 755, it is said:

> "If the defendant tenders a plea in abatement and it is demurred to, raising a question of law, or if in any way the issue becomes of law, and the Court decides against him, he may plead over to the indictment the same as in felony."

But it may be said that the amendment should have been offered before the referee. This is certainly not required. The referee has no power to enforce the order; he simply certifies to the Court. It does not become an enforcible order until the Court acts. The Court may or may not approve it. It is not a determination or final order until the Court acts, and defendant is entitled to this action before he can be required to plead over.

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As to the fifth proposition—

That the Court erred in sentencing W. T. Nugent to be imprisoned for an indefinite length of time, or until he pay said money to the trustee:

Said sentence is found on page 36 of the Record, and is as follows:

> "And thereupon pursuant to the opinion of the Court filed herein on the 1st instant, it is the judgment of the Court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson County, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.45, or otherwise satisfy the said trustee with respect thereto, and the Court reserves the right and power to suspend or set aside the judgment and sentence upon the delivery, payment or satisfaction aforesaid.
>
> "To all of which the respondent, William T. Nugent, excepts."

The Court in making this order quotes as authority therefor Tinsley vs. Anderson, 171 U. S. 107, and *In Re* Swan, 150 U. S. 637. Both of these cases were on writs of habeas corpus, and the rule is well settled that such writs cannot take the place of review by writ of error or appeal.

Besides, both of these cases were for the delivery of other property, as well as money. The order in the case of Tinsley vs. Anderson was, "*until he deliver the property, or until he be discharged by further orders of the Court.*"

The order in the Swan case was that he be confined until he deliver the goods taken from the receiver, and that he

be confined as a punishment for three months and until he pay the costs.

The question was made that the Court exceeded its authority in imprisoning for costs, but the Court said this question could not now be raised, as he had not served the three months' sentence.

In the case at bar the order is that he be confined "until he shall deliver or pay to Arthur E. Mueller, trustee herein, said sum of $14,233.45, or otherwise satisfy the said trustee with respect thereto, and the Court reserves the right and power to suspend or set aside the judgment and sentence *upon the delivery, payment or satisfaction aforesaid.*"

So it clearly appears that the Court reserves the right to suspend or set aside said judgment only in the event that W. T. Nugent complies with said order. This is not the order in the case of Tinsley vs. Anderson, and in the Swan case the Court did not decide the question of imprisonment for costs.

By Section 990 of the Revised Statutes of the United States it is provided:

> "No person shall be imprisoned for debt in any State on process issuing from a Court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon punishment for debt provided by the laws of any State, shall be applicable to the process issuing from the Courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of said State."

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By the 18th section of the present Constitution of Kentucky it is provided :

"The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law."

Section 2180 of the Kentucky Statutes, made in pursuance of said constitutional provision, provides :

"Any person taken or charged in execution in any civil case may, by petition, apply for a discharge to a justice of the peace or the presiding judge of his county, or the police judge of the county seat, who shall, by warrant under his hand, require the keeper of the jail to bring the body of the petitioner before him at the court house on a specified day, and a list of the several executions with which he may stand charged.

1. "Ten days' notice of the time and place of such application, and a copy of the schedule of the property he intends to surrender, must be given to the adverse party, or his agent or attorney, if in the county.

2. "The keeper of the jail shall obey the warrant.

3. "The petitioner, when brought before the judge or justice, shall subscribe and deliver a schedule of his whole estate liable for his debts, and take an oath or affirmation in substance as follows :

"I, A B, do swear (or affirm) that the schedule now delivered contains, to the best of my knowledge and belief, a full, true and perfect account and discovery of all the estate and effects unto me in anywise belonging, and of such debts as are owing to me or in trust for me, which are liable for my debts ; and that I have not, directly or indirectly, sold, assigned, or otherwise disposed of, in trust or

otherwise, for my use or the benefit of another, or concealed any part of my effects whereby to secure the same, to receive or expect any profit or advantage from the same, to defraud any creditor to whom I am in anywise indebted.

4. "Upon the delivery of such schedule, properly verified, the judge or justice (unless it be made to appear that the petitioner has acted fraudulently) may, by warrant, command the keeper of the jail to discharge the petitioner forthwith, and the warrant shall be a justification to the keeper of the jail for such discharge.

5. "The schedule so subscribed and verified, with the petition and warrant, shall be returned to, and kept safely on file by the Clerk of the County Court of the county in which the prisoner was confined."

If it be true that the Court in this case had jurisdiction to order W. T. Nugent to pay this money, then, upon his failure to comply with said order, the relation of the debtor and creditor was created between said Nugent and the trustee.

It is not contended that if W. T. Nugent had been fined for contempt he could not be imprisoned therefor, or that he could have been released under the insolvent debtor's law of the State; but in this case no fine was entered in favor of the Government against him—the order did not even run in behalf of the Government—was entitled in the style of the civil case and was to pay money owing by him to the trustee—not any specific money, for money has no ear-marks—but a certain amount, a debt owing by him to the trustee by reason of a similar amount received by him from E. B. Nugent prior to the institution of the proceedings in bankruptcy against said E. B. Nugent.

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It is submitted that this imprisonment is in violation of law, and that under the judgment and sentence herein W. T. Nugent could not secure his release except by *complying with said order*, and that might be impossible, thus making the sentence an imprisonment for life for debt.

He could not avail himself, by reason of said order, even of the insolvent debtor's law provided by the State—that otherwise but for the wording of the sentence he might.

He may in the original transaction have committed a fraud in obtaining the money, but that does not deprive him of the right to be released—although he may have spent same—if he surrenders at the time all he has.

The **fraud** mentioned in the Kentucky Constitution refers merely to the retention of property at the time he takes the oath. The court is referred to the dissenting opinion of Shelby, Circuit Judge, in *the case of In Re Pervine*, 96 F. R. 192.

As to the sixth proposition—

That the order and sentence thereunder are erroneous and void, because they do not run in the name of the Government:

In U. S. vs. Wayne, Federal Cases, 16,654, it is held that in a civil suit the proceedings to obtain a rule for contempt must run in the name of the parties until the rule or order to pay is awarded, and then the rule or order must run in the name of the United States. The reason assigned for this is that the parties are responsible for the costs until the rule or order is awarded, but then it becomes a matter of the United States.

In Folger vs. Hoogland, 5 Johnson, New York Common Law Reports, page 235, it is said:

> "*Per Curiam.* The rule is, that until the attachment is granted, the proceedings are entitled in the names of the parties in the civil suit; but after the attachment has been granted, all the proceedings must be in the name of the people. (3 Term Rep. 133; Term Rep. 439, 528; 2 East, 182.)"

See also "In the matter of Bronson and Mitchell," 12 Johnson, 460, to the same effect.

In Worden vs. Searles, 121 U. S. 27, the order was entitled as in the case at bar. It was an order to pay to a party in the suit a certain sum of money. The Court discharged the defendant, saying:

> "We have jurisdiction to review the final decree in the suit, and all interlocutory decrees and orders. These fines were directed to be paid to the plaintiff. *We say nothing as to the lawfulness or propriety of this direction; but the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claim in the suit.*"

The contention is, that so long as the orders are entitled in the suit, it is merely a process of collecting a debt, and therefore a party can not be imprisoned on such an order, and before such imprisonment can occur, a contempt against the Government and its authority must be shown, and then the process must run in the name of the Government as a criminal case, otherwise the records show the collection of money in a civil suit in the name of the litigants by arrest and imprisonment. This is as it appears in the case at bar.

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As to the seventh proposition—

That as against W. T. Nugent under the finding, in no event, can the failure to pay be more than a *civil contempt*, and that as such, same is subject to review under Subsection "b" of Section 24 of the Bankrupt Act of 1898, and that pending said review said Nugent is entitled to be released on bond, conditioned for his personal appearance:

It is contended that these proceedings herein constitute a criminal contempt and come under the rule laid down in the following cases:

*Ex Parte* Kearney, 7 Wheaton, 38 (Book V, 391).

New Orleans vs. Steamship Co., 20 Wallace, 387 (Book XXII, 355).

*Re* Debs, 158 U. S. 564 (Book XXXIX, 1092).

*In Re* Swan, 150 U. S. 636 (Book XXXVII, 1207).

Hayes vs. Fischer, 102 U. S. 121 (Book XXVI, 95).

But in Tinsley vs. Anderson, 171 U. S. 101 (Book XLIII, 96), in referring to these cases, it is said:

> "It was argued in behalf of Tinsley that the judgment committing him for contempt was not reviewable by this Court; citing the statement in Chetwood's Case, 165 U. S. 443, 462 (41:782, 788), that 'judgments in proceedings in contempt are not reviewable here on appeal or error. Hayes vs. Fischer, 102 U. S. 121 (26: 95), *Re* Debs, 158 U. S. 564, 573 (39: 1092, 1095), and 159 U. S. 251 (mem).' But that statement was made in regard to such judgments in *independent proceedings for contempt* in the Circuit Courts of the United States; and the reason is, as stated in cases referred to in Hayes vs. Fischer, above cited, that such judgments were considered as judgments in criminal cases, in which this Court had

no appellate jurisdiction from those Courts. *Ex Parte* Kearney, 7 Wheaton, 38, 42 (5: 391, 392); New Orleans vs. New York Mail Steamship Company, 20 Wallace, 387, 392 (22: 354, 357)."

Thus clearly approving the doctrine of a distinction existing between *independent proceedings* in the Circuit Courts of the United States for contempt and proceedings had as mere incidents of plaintiff's rights in a suit pending.

In Hayes vs. Fischer, 102 U. S. 121, it is said:

"If the order complained of is to be treated as a part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this Court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only."

In the case at bar, however, Section 24 of the Bankrupt Act gives this Court jurisdiction in equity to revise both final and interlocutory matters of law.

In *Ex Parte* Kearney, 7 Wheaton, 38, Kearney was imprisoned for refusing to answer questions as a witness on trial of an *indictment*, and being imprisoned, on trial of habeas corpus sued out by him, it was held that said matter was a criminal contempt.

In New Orleans vs. New York Mail and Steamship Company, 20 Wallace, 387, the Mayor of the city was on rule fined $300 for contempt committed by him by suing out an injunction from a court other than the one wherein the same matters, between the same parties, were pending on injunction. Held a criminal contempt.

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*In Re* Debs, 158 U. S. 564, Debs was held under sentence for violation of injunction prohibiting him from interfering with certain roads engaged in interstate commerce. Release refused on habeas corpus because held that he was guilty of a criminal contempt.

*In Re* Swan, 150 U. S. 636. Swan was sentenced on rule for contempt in taking property from possession of the receiver of the Court. Habeas corpus refused. Held criminal contempt.

In the Nugent case, at bar, the contempt proceeding is a mere incident to a recovery in the suit pending. The trustee, who represents the bankrupt's estate, filed his petition in the bankrupt proceedings, and without notice to or service on W. T. Nugent, obtained an order against him, not to show cause for a contempt committed by him in obtaining the money, for, **both the Court and the referee find that he received it before the petition in bankruptcy was filed**, and therefore lawfully; *but to show cause why he shall not pay same to the trustee.* By his response he tenders what he considers a good plea, want of jurisdiction; both the referee and the Court held his response insufficient; he tendered an amendment, which the Court refused to permit him to file, and judgment and sentence were rendered and passed up on him, not punishing him for a *criminal contempt* to the Court, but saying to him, you pay this money to the trustee or "*otherwise satisfy the trustee with respect thereto*" or you will have to remain in jail until you do. The Government is not interested in this judgment, but the trustee alone. The order is for his benefit alone, and he can dictate the terms of release. This in its very nature can be nothing more than a civil or *quasi* contempt.

In Rapalje on Contempts, Section 21, it is said:

"Civil contempts are those *quasi* contempts which consist in failing to do something which the contemnor is ordered by the Court to do for the benefit or advantage of another party to the proceedings before the Court, while criminal contempts are all those acts in disrespect of the Court or of its process, or which obstruct the administration of justice or tend to bring the Court into disrespect."

In Tyler vs. Hammersley, 44 Conn. 393, 26 American Reports, 471, it is held:

"That although an adjudication of contempt, under the common law practice, is not reviewable by a Court of error, yet where the moving party tenders an issue of law upon which the question of contempt is tried, a writ of error will lie upon the adjudication thereon."

The distinction between a *civil* and *criminal contempt*, and the right of appeal in cases of the former, is clearly held City of Newport vs. Newport Light Company, 92 Ky. 446, and Brown vs. Brown, 96 Ky. 506.

*In Re* Graves, 29 Federal Reporter, 63, is a case wherein Graves in a case pending was ordered to pay money into Court, and the rule was served on him, and failing to respond he was adjudged in contempt, and ordered to jail until he obeyed. He left the State and was arrested in another State, and attempted to be removed under Section 1014 of the Revised Statutes of the United States. The Court refused to grant the removal, holding that the proceedings showed a *civil* and not a *criminal* contempt.

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The Court's attention is especially called to the case of Hendryx vs. Fitzpatrick, 19 F. R. 810, and authorities there cited, wherein it is held that :

"An order committing a defendant for contempt, in refusing to pay a sum of money, is *civil* and not *criminal* in its nature, and the Court which committed him is at liberty to release him again in case he shows himself unable to comply with the requirements of the Court."

In Worden vs. Searles, 121 U. S. 27 (Book XXX, 853), it is said :

"The appellants ask for a review and reversal of the orders imposing fines for a violation of the preliminary injunction. The appellee contends that this Court cannot review the action of the Circuit Court in punishing a contempt committed by a violation of such injunction, (1) because the proceedings were criminal in their character ; (2) because the action of the Circuit Court is, by Section 725 of the Revised Statutes, expressly made discretionary.

"All the proceedings which resulted in the imposition of the fines *were taken and entitled in the suit.* The order of March 6, 1882, *is entitled in the suit*, and adjudges 'that the said defendants are guilty of the contempt charged against them for a violation of the injunction issued in this cause, and that said defendants, Alva Worden and John S. Worden, *pay to said complainant, Anson Searles*, the sum of two hundred and fifty dollars, as a fine for said violation, together with costs of said proceedings, to be taxed, and that said defendants stand committed until the same is paid.' The order of October 9, 1882, *is entitled in the suit*, and orders 'that said defendants, Alva Worden and John S. Worden, do pay a fine of eleven hundred and

eighty-two dollars to the Clerk of this Court, *to be paid over by said Clerk to complainant*, for damages and costs, and that said defendants do stand committed until the same is paid.' It appears that the $1,182 was made up of $682, the profits of the defendants on sixty-two gross of whip sockets sold, and $500 expenses of the plaintiff n the contempt proceedings.

"We have jurisdiction to review the final decree *in the suit*, and all interlocutory decrees and orders. These fines were directed to be paid to the plaintiff. WE SAY NOTHING AS TO THE LAWFULNESS OR PROPRIETY OF THIS DIRECTION. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. *There were incidents of his claim in the suit.* His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent. The case differs, therefore, from that *Ex Parte* Kearney, 20 U. S., 7 Wheaton, 39 (V., 391). That was an application to this Court for writ or habeas corpus where a person was imprisoned by the Circuit Court of the District of Columbia for a contempt in refusing, as a witness, to answer a question on the trial of an indictment. The application was denied, on the ground that this Court had no appellate jurisdiction in a *criminal case*.

"So, the fact in the present case (that though the proceedings were nominally those of contempt, they were really proceedings to award damages to the plaintiff, and to reimburse to him his expenses), distinguishes the case from that of New Orleans vs. Steamship Co., 87 U. S., 20 Wall. 387 (XXII, 354). There, in a suit in equity, a Circuit Court of the United States imposed a fine on a defendant for obtaining during the pendency of the suit, from a State court, an injunction against the plaintiffs as to a matter within the scope of the litigation. On appeal

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from the final decree it was sought to review the order imposing the fine, but this Court said that the fine was beyond its jurisdiction, and added: 'Contempt of Court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing.' This Court can take cognizance of a criminal case only upon a certificate of division in opinion.

"Section 725 of the Revised Statutes provides that the Courts of the United States shall have power to punish, 'by fine or imprisonment, at the discretion of the Court, contempts of their authority,' provided that such power 'shall not be construed to extend to any cases except . . . the disobedience by . . . any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said Courts.' We do not think this provision makes the action of the Circuit Court in this case such a matter of discretion that the orders imposing the fines are not reviewable. They were, to all intents and purposes, orders in the course of the cause based on the questions involved as to the legal rights of the parties.

"Although the Court had jurisdiction of the suit and of the parties, the order for the preliminary injunction was unwarranted as a matter of law, and the orders imposing the fines must, so far as they have not been executed, be held, under the special circumstances of this case, to be reviewable by this Court under the appeal from the final decree. The result is that they cannot be upheld."

In Rapalje on Contempts, Civil and Criminal, Section 21, it is said :

> "In a recent case in Nevada (Phillips vs. Welch, 11 Nevada, 187, 190), Beatty, J., says: 'If the contempt consist in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed until he complies with the order. The order in such a case is not punitive, but executive.'"

In United States vs. Sowles, 16 Federal Reporter, page 536, it is said :

> "As this imprisonment was designed merely to compel obedience and not as a punishment, and the continued disobedience was a continued contempt, it is considered that the arrest was legal and the recognizance valid."

The facts and proceedings had placed this case on all fours with the case of Worden vs. Searles, 121 U. S. 27. All the steps and proceedings had, including the order to pay, and judgment and sentence thereon, were entitled in the style of the civil action, "Wayne Knitting Mills, etc., vs. E. B. Nugent." There was no fine imposed, not even for costs, but simply a sentence that W. T. Nugent for his contempt be confined "until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.45, or otherwise satisfy the said trustee with respect thereto." Said proceedings were mere incidents of the claim in the original suit, and were to all intents and purposes orders in the course of the cause based on the question involved as to the legal rights of the parties, and as such, as to all matters of law,

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are subject to review under Section 24 of the Bankrupt Act. (See sentence and judgment, Record, page 36.)

By Section 41 of the present Bankrupt Act it is provided that:

> "A person shall not, in proceedings before a referee, disobey or resist any lawful order, process or writ." . . "The referee shall certify the facts to the Judge, if any person shall do any of the things forbidden in this section. The Judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of the Court."

And by Section 2 it is provided, among other things, that the Court shall have jurisdiction to:

> (13) "Enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment."

So, whether this be a civil contempt or order in the case pending, it is subject to review by this Court.

Is defendant, W. T. Nugent, entitled, under the law and facts of this case, to be released, pending the determination of this review, provided he execute bond, in a sum to be fixed by this Court, for his appearance and surrender upon determination hereof to answer by said surrender of his person, any judgment herein?

By Rule 36 of the Supreme Court and Rule 38 of this (6th) Circuit, being almost identical, it is provided:

1. "An appeal or writ of error from a Circuit Court or a District Court to this Court in the cases provided for in Sections 6 and 7 of the Act entitled 'An Act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes,' approved March 3, 1891, and Acts to amend said Act approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by either circuit judge within the circuit or by any district judge within his district and the proper security to be taken and the citation be signed by him, and he may also grant a supersedeas and a stay of execution or of proceedings, pending such a writ of error or appeal.

2. "Where such a writ of error to this court is allowed in the case of conviction of an infamous crime or in any other criminal case in which it will lie, the Circuit Court or District Court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed. (Adopted March 21, 1897.)"

Now, if it be held that this is a *civil* or *quasi contempt*, then defendant is entitled to review, and under the cases of "Accumulator Co. vs. Consolidated Electric Storage, 53 F. R. 793; Kirk vs. Milwaukee Dust Collector, 26 F. R. 501; New Orleans vs. Steamship Co., 20 Wallace, 592, and *In Re* Ellerbe, 13 F. R. 532, wherein it is held "that this proceeding is criminal in its nature and character, and the same rule should govern as in trial of indictments," he is entitled under this Rule 38 to execute bond.

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But should the Court determine that said judgment and sentence were nothing more than orders in the civil suit, then he was still entitled to bond under the first section of said rule.

The Act creating this Court, 1 Supplement, 2d edition, page 902, gives it authority to prescribe the form and style of seal and the form of writs and other process and procedure, etc., and to establish rules, etc. Under similar authority the Supreme Court decided the procedure in the case of "In the matter of Claasen, 140 U. S. 200," and promulgated this Rule, 36–38, at the same time.

In Hudson vs. Parker, 156 U. S. 279 (Book XXXIX, 424), it is held that while under Section 914 it is required that the practice, pleading, etc., shall conform, as near as may be, to the State practice, etc., still this section does not include the manner of bringing a case from a lower court of the United States to the Supreme Court, and in said case, in speaking of said rule in question, it is said:

> "Recurring once more to Rule 36, and to the decision *In Re* Claasen, which were considered and promulgated together, and mutually serve to explain each other, the matter stands thus: The first paragraph of the rule embracing all cases, civil or criminal, of which this Court has appellate jurisdiction under the Act of 1891, provides that the writ of error may be allowed, in term time or vacation, 'and the proper security be taken,' the citation signed, and a supersedeas granted, 'by any justice of this Court.' *In Re* Claasen it was held that in the case of an infamous crime the writ of error was a matter of right, and that no security, such as is necessary in a civil case, was required. The only 'proper security' then in a

criminal case *is security for the appearance of a prisoner admitted to bail.* Within the very terms of the rule, therefore, any justice of this Court, although not assigned to the particular circuit, would seem to have the power to permit bail to be taken. But the power rests upon broader grounds.

"*The Statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment, or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.*"

So under this theory, that is, that no person shall be compelled to undergo imprisonment until he has been finally adjudged guilty in the court of last resort, it is only necessary to determine the fact of the right of appeal, writ of error, or review, to ascertain whether or not the defendant has the right to give an appearance bond.

Defendant did not ask to supersede the collection of this money by any civil process; all he asked was that he might not be made to suffer the punishment of a criminal until he could be heard. This much is granted a defendant convicted in the lower court of an infamous crime. He could not execute bond conditioned upon the payment of this money. To have required him to do so would virtually have deprived him of his liberty before final conviction, and as held in Hudson against Parker, not even security for costs can be required before appeal is allowed. He could have appealed and remained in jail, but neither the letter nor spirit of the law contemplates this.

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W. T. Nugent was in jail under the order in this case, as well as under the indictment; bond was fixed on the indictment at $3,000; he could have executed this bond, and did so when the court granted him bond herein.

The question of bond is not a matter for review, but simply a matter of practice necessary to preserve the status of the parties pending the review.

These reviews are not tried on the allegations of the complaint, but on the record.

The Circuit Court of Appeals having decided this case upon the question of *jurisdiction*, any error that may have been committed in failing to act upon the motion to expunge certain matter from the record is not prejudicial, as the result would have been the same, and the same is true as to the issuance of the **forthwith mandate**, as that was merely a matter looking to the execution of said judgment, and does not affect the validity or correctness of same.

Respectfully submitted,

FRED. FORCHT, JR.,

W. M. SMITH,

*Counsel for W. T. Nugent.*

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OFFICE SUPREME COURT of U. S.
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No. 257.

Petition for Rehearing.

Rec'd & dist Feb. 24, 1902.

# Supreme Court of the United States.

**OCTOBER TERM, 1901.**

*No. 257.*

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, PETITIONER,

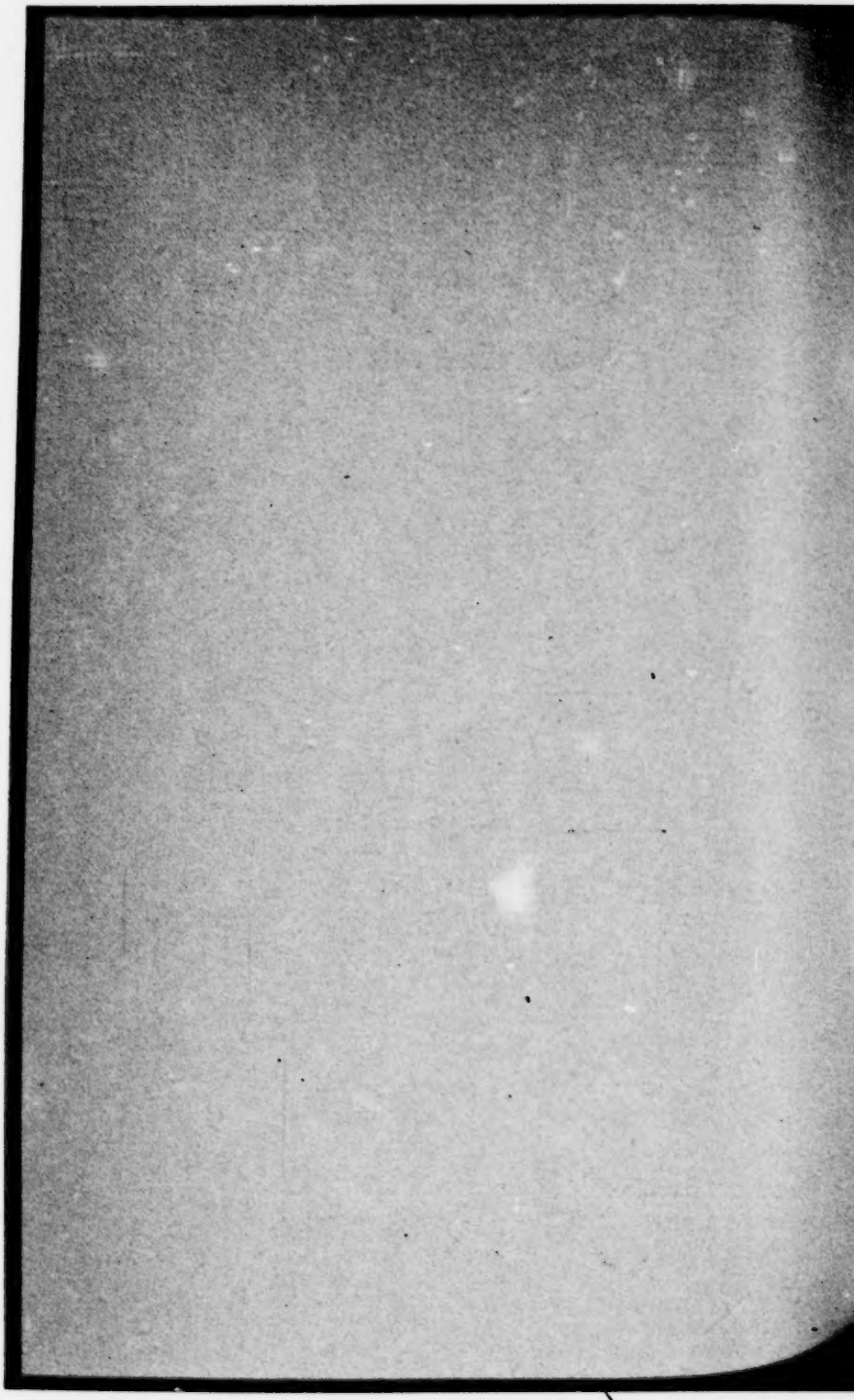
*vs.*

WILLIAM T. NUGENT.

## PETITION FOR REHEARING AND MODIFICATION OF OPINION.

W. M. SMITH,
*Counsel for Petitioner.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2192



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# Supreme Court of the United States

## OCTOBER TERM, 1901.

*No. 257.*

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, PETITIONER,

*vs.*

WILLIAM T. NUGENT.

**Petition for Rehearing and Modification of Opinion.**

Defendant in error, William T. Nugent, respectfully petitions this honorable court to grant him a rehearing herein and a modification of the opinion rendered on January 20, 1902, and assigns as reasons therefor the following, to wit:

He says that on February 19, 1900, there was filed an involuntary petition in bankruptcy against E. B. Nugent, and thereunder he was adjudged a bankrupt, and that a rule was issued against him requiring him to pay certain money into court on a day stated, but that afterwards, on a hearing, by reason of senile imbecility he was discharged.

That afterwards the trustee in said case, Arthur E.

Mueller, on April 13, 1900, filed a petition before the referee in said case (Transcript, page 13) to make this defendant, William T. Nugent, a party thereto, and asking for injunction against him, and that he be required to pay said money in court; that said petition and records referred to therein show that said money came into the hands of William T. Nugent before the petition in bankruptcy was filed.

Said Nugent had no notice of the filing of said petition until he was arrested under an indictment on October 8, 1900, and on said day a rule was served on him requiring him to show cause why he should not pay said money into court. Said rule was made returnable October 13, 1900.

That on said day he, being in jail, was brought into court by the marshal, and filed his response, in which, among other things, he alleges that—

> "That neither the court or the referee in bankruptcy herein has any jurisdiction either of this respondent or the matter involved to make any order to require this respondent to answer thereto, because he says that said records herein show that if respondent received said money, or any part thereof, it was before the petition in bankruptcy was filed, and in that event neither the court or referee in bankruptcy can proceed against this respondent as herein attempted to by order or rule to pay, and he now hereby asks that this be taken as his response herein and that said order be set aside and vacated."
>
> See Transcript, page 19.

He says that at the time he filed this response he was under indictment for receiving said money, under the 29th section of the bankrupt act, and although the indictment did not charge he received said money after the petition in

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bankruptcy was filed, the court afterward overruled a demurrer thereto.

That he was advised by his counsel at the time, that, in their opinion, said indictment on its face was bad, as they did not believe that under said section 29, a charge could be sustained for money received before the petition in bankruptcy had been filed, and that the second count was bad, because the concealment of money so received was not embraced by said section. (See indictment, Transcript, page 31.)

But that in any event, under the facts as they existed, they were of the opinion that said charges could not be sustained, but owing to the gravity thereof, and in view of section 23 of the bankrupt act, construed in Bardes against Hawarden Bank, 178 U. S., 524 (which was afterwards modified in Bryan *vs.* Bernheimer, 181 U. S., 188), it was better to enter said plea to the jurisdiction, as they regarded same as a complete answer thereto.

He says that by reason of these facts which are shown by the transcript herein, except, perhaps, the advice of his counsel, which, however, is apparent, he did not answer fully, but simply pleaded to the jurisdiction.

That before the ruling on this response as to its sufficiency was made by the referee the deposition of defendant was taken before said referee, and by his rulings then made he confirmed the views of counsel as to the correctness of the course they had pursued. (See Transcript, page 33.)

That on the 16th day of October, 1900, the referee held said response insufficient. (See Transcript, page 18.)

He says that at the time of the said ruling of the referee on said response, he, by counsel, insisted that his plea to the

jurisdiction simply raised a question of law dependent upon the record as it then stood, as all the facts pleaded were shown thereby, and admitted, but that it was insisted that the depositions in the case should be retaken before said ruling was had, and the referee was proceeding to do so, when defendant, being UNABLE TO PREVENT SAME, TO SAVE TIME AND LABOR, "without waiving any objection or exception as to jurisdiction, relevancy, or competency," as stated in said stipulation, agreed that they might be read (see Transcript, page 17), and he earnestly insists that under these circumstances he did not consent to the jurisdiction, cure any defects in the proceedings, or waive any of his rights whatever.

He says that upon said ruling he was advised that it was not final, but that by petition for review he could have same passed upon by the district court, and if said court held same insufficient he would then have the right to there plead over, and show the nature of his holding. (See petition for review, Transcript, page 21.)

Defendant says that as soon as the district court passed upon this response, he offered an amendment, that the object of counsel in asking that judgment be suspended was to prepare same, that he could not have filed same after the court held the original response insufficient, and before the opinion was filed, because in the opinion itself, AND NOT ELSEWHERE, was said response held insufficient.

It is respectfully submitted that the district court did not pass upon the nature of this amendment, but simply held:

"That it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, and declines at this

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stage of the proceeding to permit a further response to be filed." (See Transcript, page 29.)

Defendant says that by reason of the indictment heretofore mentioned, he did not make said amended response more specific, but under the court's ruling no response could have been filed at that stage of the proceedings. If this amended response is not properly made a part of this record, still it is shown that an amendment was tendered, and that thereupon the court held that no response could be filed.

Defendant respectfully submits as a matter of law, as he is advised—

1st. That whether or not this contempt proceeding against him, which is quasi-criminal, is governed by the rules of equity, or criminal practice, that the district court erred in holding that he could not file any response after said court held the plea to the jurisdiction insufficient.

2d. That as the filing of his original response herein before the referee was his first appearance in the matter, and as said response was a plea to the jurisdiction, if there was no authority in law for filing of said petition before the referee seeking to make defendant a party to said proceedings, or to proceed against him in said summary manner by rule or order, then he has not waived any of said matter, or consented to the jurisdiction, and the petition for review of the order of the referee of date October 16, 1900, holding said response insufficient, is sufficiently broad and comprehensive to present all of said questions.

Defendant says that said indictment found on page 31 of the transcript is still pending against him, and he is under bond to answer same, and he asks that he be not compelled to plead more specifically herein than he has already done until same is tried and determined.

He now states, as he did in his amended response tendered herein (Transcript, page 30), that he did not have said $14,233.49, or any part thereof, in his possession or under his control at the time of the service of process on him herein on October 8, 1900, and he had no notice of the injunction herein until the service of said process as stated.

He says that whatever part of said money that came into his possession was not held as agent or bailee, but adversely, and before the service of said process, whatever part thereof that did come into his possession he had placed beyond his control, paid on debts, and spent.

He says that he now has no money or property whatever or any way or means of raising any money, and that if, under these contempt proceedings, he is required to pay this money, or any part thereof, in court, as the district court has adjudged that he cannot further respond herein and as the opinion of this court has affirmed the decree and order of the district court, it means to him LIFE IMPRISONMENT, and it is not thought that either the letter or spirit of the law will require of a person an impossibility and then punish him for not doing it. This has often been held in like contempt proceedings, yet the result as stated will be inevitable unless a rehearing is granted, or the opinion of this

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court is so modified as to permit defendant to respond further.

He does not think he ought to be required, under the existing circumstances, to answer more specifically; yet if this honorable court holds otherwise, and thinks the proceedings herein in other respects are regular, if the opinion herein is so modified as to permit him to do so, he will respond fully and specifically herein, and he now prays this honorable court that if a rehearing is not granted that this modification be so made.

He says that when his original response was prepared and filed herein, this bankrupt act, and especially the sections applicable hereto, had not been fully construed; that the opinions of many of the district courts were in line with the contentions herein, and the case of Bardes *vs.* Hawarden Bank was thought to sustain the same; that the circuit court of appeals herein, in its opinion, found on page 43 of transcript, did not decide the question made as to defendant's right to file the amended response, because it was not necessary, as it was held said original response was sufficient, and this opinion was based mainly on the Bardes case.

All business transactions based upon a construction of the highest courts are held valid and binding, even after that decision is reversed.

Considering the dire consequences herein that will follow, and the further fact that defendant had an additional reason for pursuing this course—THE INDICTMENT—it seems but

right that he should now be permitted to conform to the opinion herein rendered, and to file his response, setting forth specifically all matters, and he respectfully prays for a rehearing herein and a modification of said opinion as stated.

W. M. SMITH,
*Counsel for Petitioner.*

I, W. M. Smith, do hereby certify that in my opinion the foregoing petition is well founded in fact and in law, and should be granted.

W. M. SMITH.

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# Supreme Court of the United States.

No. 257.—October Term, 1901.

Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, Bankrupt, Petitioner, *vs.* William T. Nugent. | On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 20, 1902.]

Edward B. Nugent was adjudicated a bankrupt March 23, 1900, on the petition of the Wayne Knitting Mills and others, his creditors, filed in the District Court of the United States for the District of Kentucky, February 19, 1900, and the matter was referred to a referee. Arthur E. Mueller was appointed trustee of the bankrupt's estate, and on the seventh of April he obtained an order from the referee requiring the bankrupt to show cause why he should not pay over the sum of $14,233.45, made up of two items of $4,133.45 and $10,100. The response of the bankrupt was held insufficient; he was ordered to pay over; on failure to do so, was adjudged guilty of contempt, and the matter was reported to the court by the referee with a recommendation that he be committed. On the suggestion that approaching senile imbecility made the bankrupt an unfit subject of punishment the court discharged him, without prejudice to a renewal of the matter before the referee if subsequent developments rendered it proper.

April 13, 1900, the trustee filed his petition praying that an injunction might be issued against William T. Nugent, restraining him from disposing of the sum of $14,435.45, or any part thereof, belonging to the estate of the bankrupt, and for an order requiring him to pay the money to the trustee. This petition stated that William T. Nugent was in hiding. The referee granted the injunction and entered an order that said William T. Nugent show cause within five days from service thereof why he should not be required to pay over.

A copy of this order was served on William T. Nugent, October 8, 1900, and on October 13 he appeared in person and by counsel, and filed a response to the rule. In this respondent set forth that "neither the court or the referee in bankruptcy herein, has any jurisdiction either of this respondent or the matter involved, to make any order or to require this respondent to answer thereto, because he says that said records herein show, that, if respondent received said money or any part thereof, it was before the petition in bankruptcy was filed, and in that event neither the

court or the referee in bankruptcy can proceed against this respondent as herein attempted by order or rule to pay, and he now hereby asks that this be taken as his response herein, and that said order be set aside and vacated. He says that at no time since the filing of the petition in bankruptcy herein, has he received said $14,435.45 or any part thereof."

For further response he said that he had been indicted in the district court for receiving said $14,435.45, after the filing of the petition, and with retaining the same, and aiding and abetting in the retention thereof, both after the filing and the adjudication, for the purpose of defeating the bankrupt law, and that he ought not to be required to respond, and his response would tend to incriminate him.

The matter came on for hearing October 16, it being stipulated, without prejudice to the objection to the jurisdiction, that the depositions of Edward B. Nugent, and others named, (not including William T. Nugent,) theretofore taken in the cause, might be read. The referee summarized the evidence, as appears from his certificate, thus:

"The testimony shows, and I so find, that on the 9th day of February, 1900, the bankrupt, Edward B. Nugent, borrowed from George L. Erbach and Frank Hohmann, executors, the sum of $4,500, and as security therefor executed a mortgage upon the house and lot of land owned by said Edward B. Nugent, in the city of Louisville; that after paying the taxes and expenses of procuring the loan there remained from said sum so borrowed the sum of $4,133.45; that on said day the said balance of $4,133.45 was delivered to said W. T. Nugent as the agent of the bankrupt, and the said amount has not been accounted for to the trustee in bankruptcy herein.

"I further certify that on the 19th day of February, 1900, before the hour of 2 o'clock P. M., being more than three hours before the petition praying for an adjudication of said Edward B. Nugent as bankrupt was filed in the clerk's office of said court, the stock of merchandise belonging to the bankrupt was sold to one Hermann Straus for the sum of $12,000, and on said 19th day of February, 1900, and before the hour of 2 o'clock P. M., the said $12,000 was paid to said bankrupt by said Hermann Straus, in the form of a check on the German Bank of Louisville, Ky.; that said bankrupt endorsed his name across the said check and delivered the same to said W. T. Nugent, his son, as his agent; that said W. T. Nugent received the cash upon said check on that day before the hour of 2 o'clock P. M., and paid therefrom the sum of $1,900 for rental on the building where said stock was located and the expenses of making the sale, leaving the sum of $10,100, which then and there still remained in the hands of said W. T. Nugent as the agent of said bankrupt.

"I further find that both of said balances, to wit, $4,133.45 and $10,100, belonged to the said bankrupt and became and still are the property of Arthur E. Mueller, trustee in bankruptcy in this cause, and that said W. T. Nugent holds the same as agent or bailee only, and that he has not accounted for any part of said sums."

The referee entered an order on the same day, October 16, 1900, omitting preliminary recitals, as follows:

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"And after hearing counsel, now therefore it is ordered and adjudged that the said response to the rule aforesaid be and the same is hereby held insufficient; and it appearing from the evidence in this cause that there came to the hands of W. T. Nugent $4,133.45, being the net proceeds realized from the mortgage executed by the bankrupt upon his house and lot in the city of Louisville, and that there also came to the hands of said W. T. Nugent the further sum of $10,100, being the net proceeds from the sale of the stock of merchandise sold to Herman Straus—the first of said sums having come to the hands of said W. T. Nugent as the agent of the bankrupt on February 9th, 1900, and the second sum, to wit, $10,100, having come to the hands of the said W. T. Nugent as the agent of the bankrupt on February 19th, 1900, before the hour of 2 o'clock P. M., on said day, and it further appearing that the petition of the Wayne Knitting Mills and others, praying that the said Edward B. Nugent may be adjudged a bankrupt, was filed in the office of the clerk of the above-styled court on February 19th, 1900, at 5 o'clock P. M., and it appearing that said W. T. Nugent has failed to pay over said sums, or any part thereof, to the trustee in bankruptcy herein, and that said sums are the property of the bankrupt, Edward B. Nugent, and belong to said trustee as part of said estate, it is ordered that said rule be and the same is hereby made absolute to the amount of said two sums aggregating the sum of $14,233.45.

"It is further ordered that said W. T. Nugent be and he is hereby required to pay to Arthur E. Mueller, trustee in bankruptcy in this cause, on or before 9.30 o'clock A. M. on October 17th, 1900, the said aggregate sum of $14,233.45."

Thereupon, October 17, William T. Nugent filed his petition that the order of October 16 might be reviewed by the District Judge, and the referee made his certificate of the proceedings and the foregoing summary of the evidence, the depositions put in before him being returned herewith, concluding: "And the said question, to wit, the validity of the said order of October 16th, 1900, above set forth in full, is certified to the judge for his opinion thereon."

The referee also reported that William T. Nugent had failed to comply with the order in whole or in part; that he was in contempt of court; and recommended "that he be punished for contempt and committed to prison until he shall have paid to the said trustee the said sum of $14,233.45."

The record of the District Court shows that on the 1st day of November the cause came on to be heard on the petition of William T. Nugent for a review of the order of court entered by the referee requiring said Nugent to pay over, and the certification of the referee, and his recommendation that said Nugent be punished for contempt, and that the court being fully advised delivered a written opinion, which was ordered filed, whereupon William T. Nugent moved the court to postpone the entry of judgment until November 3, and it was so ordered.

The District Judge stated the facts at length; pointed out that the response was put upon two grounds, namely, that the court and referee

were without jurisdiction, and that respondent had been indicted; held that as to the indictment, it was not an indictment for disobedience to the order, but under § 29 of the bankrupt act; that exculpation could not criminate; that he could have denied receiving or concealing the money, or paid it into court, but he had done neither; that he had the money and that it belonged to the estate; that the response really rested on the denial of jurisdiction; and that the referee had the power to order the money to be surrendered. The matter was summed up in these words:

"The respondent has the money in his hands as agent or bailee only. His possession is that of his principal. His principal was his father up to a certain stage of these proceedings, but whether up to the filing of the petition or up to the adjudication we need not stop to inquire, as it is immaterial in this case. At one or the other of those times his principal, by operation of law, was changed, and an officer of this court was substituted for his father. That change in no way lessened the duty of paying the money to the proper principal upon notice and demand. After the change, however, the money was potentially in the custody of the law in these proceedings, and subject to the orders of the court. The rule and its service constituted sufficient notice and demand. The order made was that the respondent should pay the money to the proper officer. Disobedience of that order is made punishable as a contempt by the express provisions of the act.

"The court, therefore, has jurisdiction of the person and of the subject matter, the rulings of the referee appear to be right, and are approved and confirmed, and his recommendation as to punishing the respondent for the contempt adjudged will be acted upon with appropriate vigor. . . .

"The judgment of the court, in the exercise of its statutory discretion, will be that the respondent, W. T. Nugent, for his contempt aforesaid, be imprisoned in the county jail until he shall deliver to Arthur E. Mueller, the trustee, said sum of $14,233.45, and the court will reserve the right to suspend or set aside this judgment and sentence upon the delivery and payment of the money as ordered." 104 Fed. Rep. 530.

On the third of November the respondent Nugent asked leave to file an amended response, stating that he had not made full response as to the entire facts because the referee had held he could not be examined as to transactions involved in the indictment, and denying that the $14,233.45, or any part thereof, was now in his possession or under his control, or was on October 8, 1900, and saying "that neither at the time of the filing of the petition in bankruptcy herein against E. B. Nugent, or at any time subsequent thereto, did he have in his hands any amount of money belonging to said Nugent which he held as his agent or bailee. He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent, or any such money at any subsequent date thereto, was not received or held by this respondent as agent or bailee, or in any trust capacity whatever, but was held adversely to said E. B. Nugent."

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The District Court would not permit the proposed amendment to be filed, and entered this order:

"Came William T. Nugent, respondent herein, and tendered an amended response, and moved to file same, and the court not having postponed the imposing of the sentence for that purpose, and being of opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed.

"And thereupon, pursuant to the opinion of the court, filed herein on the 1st instant, it is the judgment of the court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson County, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.45, or otherwise satisfy the said trustee with respect thereto, and the court reserves the right and power to suspend or set aside the judgment and sentence upon the delivery, payment or satisfaction aforesaid."

Thereafter William T. Nugent filed a petition for review, under subdivision *b*, section 24, of the act, in the Circuit Court of Appeals, praying "that the orders, judgments, and sentence of the District Court be reviewed and revised in the matters of law, so as to adjudge that your petitioner be released and discharged," or "that he be permitted to further respond in said matter."

This petition alleged error in that the District Court held that the referee and the court had jurisdiction to proceed against petitioner in a summary way; that the court had jurisdiction on the proceedings and recommendations of the referee to punish petitioner for contempt; that the referee had power to grant the injunction against petitioner, or to proceed on rule to show cause; that the response was insufficient; that the facts were that the money belonged to the bankrupt's estate and was held by petitioner as the bankrupt's agent, and was not claimed adversely; that the amended response should not be filed; that the petitioner was properly before the court; and that the contempt proceedings should not be dismissed and petitioner discharged.

The amended response was attached as an exhibit to this petition, although it had not been filed in the District Court or made part of the record there by certificate of exceptions or order of identification, and the petition also set up several matters and exhibits which apparently were not before the referee or the District Court in the proceeding. The trustee moved to expunge these various matters and exhibits.

To expedite the hearing this motion was reserved, and it was stipulated that "such affirmative allegations of said petition for review as properly should be denied be treated as controverted of record without prejudice to the hearing of said motion."

The Circuit Court of Appeals, December 13, 1900, filed a memorandum opinion, and entered judgment reversing the decree of the District Court,

with directions to that court to vacate the order of the referee on respondent to show cause and his order adjudging respondent to be in contempt thereof, and that respondent be discharged from imprisonment. An extended opinion was subsequently filed. 105 Fed. Rep. 581.

The writ of certiorari was then granted by this court. 180 U. S. 640.

Mr. Chief Justice FULLER delivered the opinion of the Court:

General order in bankrupcy XXVII, (172 U. S. 662,) provides: "When a bankrupt, creditor, trustee, or other person shall desire a review by the judge, of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Respondent accordingly filed his petition for a review of the order of October 16. The referee thereupon certified to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon. He pursued in so doing Form No. 56 of the Forms in Bankruptcy. (172 U. S. 718.) The question certified was "the validity of the said order of October 16th, 1900, above set forth in full." At the same time the referee reported the disobedience of William T. Nugent and recommended that he be committed. No exception was taken before the referee or the District Court to the sufficiency of the trustee's application, or to the adequacy of the certificate, and the entire evidence was transmitted.

Subdivision *b* of section 24 provides: "The several Circuit Courts of Appeals shall have jurisdiction in equity, either interlocutory or final, to superintend or revise any matter of law in the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

The District Court affirmed the order of October 16, and ordered respondent to be committed for his failure to comply therewith, and thereupon respondent filed in the Circuit Court of Appeals his petition for review. The matters of law to be passed on by that court were the validity of the order of October 16, as affirmed by the District Court, and the correctness of the order of commitment. And these were to be determined on the record of the District Court.

The Circuit Court of Appeals had in prior cases recognized the general proposition that those courts are confined on petitions for review to matters of law arising on the record of the courts below, and may well have assumed that there was no necessity for a specific ruling on the motion to expunge the new matter accompanying the petition in this instance. *Cunningham* v. *German Insurance Bank*, 103 Fed. Rep. 932; *Courier Journal Company* v. *Brewing Company*, 101 Fed Rep. 699. The record

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of the District Court in respect of the order of October 16 was the record made before the referee, who had certified the question of the validity of the order at the request of respondent, and to the adequacy of whose certificate respondent had made no objection as heretofore said.

It is true that after the decision of the District Court was announced, and the final order was about to be entered, the entry of the order was suspended, on the application of the respondent, for two days, and that then the respondent undertook, by way of amendment, to set up a denial that he held the money as the bankrupt's agent, or bailee, and to assert that he held adversely to him. The District Court refused to allow the amendment to be made at that stage of the proceedings, and we do not understand that the Court of Appeals held that the District Court abused its discretion in so refusing.

At an earlier stage perhaps this ruling might have been controlled by the rules of equity practice adopted by this court, but that would not be so after hearing had been had, the decision of the court had been announced, and judgment was about to be entered.

The respondent had denied the jurisdiction on the ground that he had not received the money, or any part of it, after the petition in bankruptcy was filed. When the matter came on to be heard on the rule to pay over, respondent agreed that the enumerated depositions might be read, reserving his exceptions to the jurisdiction. He then carried the matter to the district court, and after it was decided, sought to amend his response to the rule by asserting that whatever money belonging to the bankrupt came to his hands was not received as agent of but was held adversely to the bankrupt. He did not even then set forth what money he had received, and how and when it came to his hands, or the circumstances under which he claimed to hold it adversely, but put forward simply a conclusion of law. The district court held it not admissible practice to permit such an amendment at that stage, that is, that the application came too late after the case had been heard and determined, and a written opinion had been delivered and filed; and the district judge may have considered it a mere subterfuge in evasion of the effect of the decision, or that the proposed amendment was insufficient. If the proposed amended response be treated as properly before us, we agree that the orders under consideration ought not to be disturbed because of this ruling made in the competent exercise of judicial discretion. And, moreover, respondent did not ask to plead over before the referee, but had the case certified to the judge as it stood.

Among the definitions set forth in section 1 of the bankruptcy act are these: "'Court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;" "'judge' shall mean a judge of a court of bankruptcy, not including the referee;"

"'referee' shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead."

By section 2, courts of bankruptcy are vested with power to "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees."

Section 36 provides that "referees shall take the same oath of office as that prescribed for judges of United States courts."

Section 38, that referees shall have jurisdiction to "(4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

And section 39, that among other duties of referees, they shall "(5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges."

Section 41 provides that "a person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ;" and that "*b* The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court."

General Order XII provides that after the order of reference reaches the referee, "all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

General Order XXIII is: "In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the

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manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests."

And we repeat General Order XXVII: "When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

No objection was made before the referee or the District Court, to the authority of the referee as such, to entertain these proceedings; to enter the order to show cause and thereby to bring in William T. Nugent; and to enter the order of October 16; and we do not find that the act or the general orders are to the contrary.

It is now said that the only power the referee has to direct the taking possession of property is given by subsection three of section 38*a*, providing that the referee may exercise the powers of the judge in that respect on a certificate of the clerk that the judge is absent or unable to act. But that provision seems to refer only to the seizure of property by the marshal or a receiver prior to adjudication and the qualification of the trustee as provided by section 2, section 3*c*, and section 69, and it is at all events inapplicable here.

We think the referee has the power to act in the first instance in matters such as this, when the case has been referred, and in aid of the court of bankruptcy, and exercises in such cases "much of the judicial authority of that court." *White* v. *Schloerb*, (178 U. S. 542.) By petition for review the matter can be carried to the bankruptcy court and the entire record and findings laid before that tribunal as was done here.

And if the order of October 16 was in itself a lawful order, the power of the District Court to commit William T. Nugent until he surrendered the money to the trustee, or otherwise satisfied the trustee with respect thereto, was unquestionable under the express provisions of the bankruptcy act in that behalf, as well as the general jurisdiction of the court to enforce its orders in the collection of assets.

It is objected that the order of commitment was invalid because it did not run in the name of the United States. This objection was not made below; nor was this an attachment. It was an order to detain Nugent until he complied with an order made in a proceeding in equity under the bankrupt act. The objection is untenable. Nor was the commitment imprisonment for debt, as also contended. The order to pay over the money was not an order for the payment of a debt, but an order for the surrender of assets of the bankrupt placed *in custodia legis* by the adjudication.

The real question was whether the order of October 16, as confirmed by the District Court, was a lawful order. It was to be determined as a mere question of law on the facts found that the money belonged to the bankrupt's estate, and was then in Nugent's possession as the bankrupt's agent, he asserting no adverse claim. And the question of the validity of that order involved the validity of the order to show cause.

The proposition was that, as matter of law, where property of a bankrupt has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the bankruptcy court has no power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed.

In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the circuit court or a State court, as the case may be?

If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient.

The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law.

It is as true of the present law as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction, *Bank* v. *Sherman*, 101 U. S. 407; and on adjudication, title to the bankrupt's property became vested in the trustee, §§ 70, 21*e*, with actual or constructive possession, and placed in the custody of the bankruptcy court.

There was no pretence that at the date of the filing of this petition in bankruptcy this money of the bankrupt, $4,133.45 of which had been collected a few days, and $10,100, a few hours, before, was held subject to any adverse claim, or that the right or title thereto had been passed over to another.

The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our assent

But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy

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court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while its conclusion might have been that an adverse claim, not merely colorable, but real even though fraudulent and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits. If it erred in its ruling either way, its action would be subject to review.

In this case, however, respondent asserted no right or title to the property before the referee, and the circumstances under which he held possession must be accepted as found by the referee and the District Court.

The decisions of this court under the present law sustain the validity of the action we are considering.

In *Bardes* v. *Hawarden Bank*, 178 U. S. 524, the question related to the jurisdiction of the District Court over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of proceedings in bankruptcy. The court said: "Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any State court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws or treaties of the United States, he could have brought suit in the Circuit Court of the United States. He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits." And it was held that Congress, by the second clause of section 23 of the bankruptcy act, had manifested its intention "that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant.'" The court was dealing there with a suit of the trustee against a third party to recover property fraudulently transferred to him by the bankrupt before the filing of the petition in bankruptcy, and which the third party claimed as his own.

In *White* v. *Schloerb*, 178 U. S. 542, where, after an adjudication in bankruptcy and reference of the case to a referee, and before the appointment of a trustee, the referee had taken possession of the bankrupt's stock of goods in a store, a writ of replevin of part of the goods was sued out by third persons against the bankrupt from a State court and executed by the sheriff forcibly entering the store and taking possession

of the goods, it was held that the District Court of the United States, sitting in bankruptcy, had jurisdiction by summary proceedings to compel the return of the property seized.

In *Bryan* v. *Bernheimer*, 181 U. S. 188, Abraham, nine days before the filing of a petition in bankruptcy against him, made a general assignment to Davidson of all of his property for the benefit of his creditors. After the filing of the petition Davidson sold the property to Bernheimer. After the adjudication in bankruptcy and before the appointment of a trustee, the petitioning creditors applied to the court for an order to the marshal to take possession of the property, alleging that this was necessary for the interest of the bankrupt's creditors. The court ordered that the marshal take possession, and that notice be given to the purchaser to appear in ten days and propound his claim to the property, or failing to do so, be decreed to have no right in it. The purchaser came in and propounded his claim, stating that he bought the property for cash in good faith of the assignee, and praying that the creditors be remitted to their claim against the assignee for the price, or that the price be ordered to be paid by the assignee into court and paid over to the purchaser, who thereupon offered to rescind the purchase and waive all further claim to the property. This court held that the summary proceeding was properly entertained; that the purchaser had no title in the property superior to the bankrupt's estate; and that the equities between him and the creditors might be determined by the District Court, bringing in the assignee if necessary. In that case it was observed that the remark in *Bardes* v. *Bank*, that the powers conferred on the courts of bankruptcy after the filing of a petition in bankruptcy, and in case it was necessary for the preservation of the property of the bankrupt to authorize receivers or the marshals to take charge of it until a trustee was appointed, "'can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant,' was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his appointment." The court also said: "The general assignment, made by Abraham to Davidson, did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors." And further: "The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself."

In the case before us, William T. Nugent held this money as the agent of his father, the bankrupt, and without any claim of adverse interest in himself. If it was competent to deal with Davidson, the assignee in the case of *Bryan* v. *Bernheimer*, by summary proceeding, William T. Nugent could be dealt with in the same way.

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The cases are indeed different, for Bernheimer, the purchaser, submitted himself to the jurisdiction of the bankruptcy court and the sale was after petition filed, but nevertheless, so far as the question of subjecting a mere volunteer in possession of assets belonging to the bankrupt's estate to the control of that court by summary proceedings is concerned, the ruling in *Bernheimer's* case is in point.

We are of opinion that the order of October 16 was a lawful order. In arriving at that conclusion we have confined ourselves to the record of the District Court. If in the effort to escape the jurisdiction of the bankruptcy court, that record is not in a condition as favorable to respondent as the actual facts might have justified, he has only himself to thank for it; but, lest any injustice should be done, the judgment will be:

*Decree of the Circuit Court of Appeals reversed; decree and order of the District Court affirmed; and cause remanded to the latter court with liberty to take such further proceedings as it may be advised.*

True copy.

Test:

*Clerk Supreme Court, U. S.*